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Supreme Court, U.S.
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No.

OCTOBER TERM, 1986

IN THE SUPREME COURT OF THE UNITED STATES

RODNEY ALDER, RITA ALDER, MARDEN ALDER, SHARON ALDER, ESTATE OF ELBERT ALDER, AND BEAULAH ALDER,

Petitioners,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

David L. Curl and Louis W. Barassi
BARASSI & CURL, P.C.
485 South Main Avenue
Post Office Box 1031
Tucson, Arizona 85702-1031
Telephone: (602) 884-7777

Attorneys for Petitioners

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Attorneys for Petitioners

QUESTIONS PRESENTED*

1. Is the rule regarding the accrual of a cause of action as set forth in this Court in U.S. v. Dickinson still valid?

2. Does a cause of action for inverse condemnation accrue on the taking of a non-compensable property interest as held by the Court of Appeals?

3. Is the statute of limitations tolled during the time when Petitioners were waiting for a determination of fair value for their Fifth Amendment property rights?

4. May the Government reap the benefit of affirmative misconduct by claiming that what the Government declared as true in 1969 was not in fact true, according to the Court of Appeals?

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*All parties to the instant case are listed in the caption of the Petition. Pursuant to Supreme Court Rule 21.1(6). *Bundrick v. U.S.* was consolidated with this case at trial, and consolidated for oral argument by the Court of Appeals. Counsel recently filed a Petition for Writ of Certiorari in the matter of *Bundrick v. U.S.*, (*Case No. 85-1815*), docketed April 30, 1986.

Petitioners, Rodney Alder, Rita Alder, Marden Alder, Sharon Alder, the Estate of Elbert Alder, and Beaulah Alder, respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Federal Circuit entered on February 28, 1986.

OPINIONS OF THE COURTS BELOW

The February 28, 1986, opinion of the Court of Appeals (Appendix "A", pp 1-11) has not yet been officially reported. The March 22, 1985, opinion of the United States Claims Court (Appendix "B", pp 12-26) is reported at 7 Cl.Ct. 542 (1985).

JURISDICTION

The opinion of the Court of Appeals was entered February 28, 1986, (Appendix "A"), and the jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment V of the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

2. Act of Congress Sess. I Ch. 398, 1896, Agreement With The Indians of the San Carlos Indian Reservation in Arizona

AGREEMENT WITH THE INDIANS OF THE SAN CARLOS INDIAN RESERVATION IN ARIZONA.

Agreement with San Carlos Reservation Indians.

SEC. 10. Whereas Province McCormick, United States Indian inspector, did, on the twenty-fifth day of February, eighteen hundred and ninety-six, in

accordance with the provisions of the Act of Congress of March second, eighteen hundred and ninety-five (Twenty-eighth Statutes at Large, page eight hundred and ninety-four), conclude an agreement with the Indians of the San Carlos Reservation, Arizona, for the cession and relinquishment to the United States of lands of the reservation embracing the coal fields, which said agreement is in words and figures as follows (House Document Numbered Three hundred and twenty, Fifty-fourth Congress, first session), to wit:

This agreement, made on the twenty-fifth day of February, one thousand eight hundred and ninety-six, pursuant to an item in the Act of Congress making appropriations for current and contingent expenses and fulfilling treaty stipulations with Indian tibes for the fiscal year ending June 30, 1896, as follows: "The Secretary of the Interior is authorized to negotiate with the Indians on the San Carlos Reservation, Arizona, through an inspector, for the cession or relinquishment to the United States of the lands embracing the coal fields, and that any agreement made shall be submitted to Congress for its action," by Province McCormick, United States Indian inspector, on the part of the United States, and the Apache, Mohave, and Yuma Indians, residing on the San Carlos Indian Reservation, in the Territory of Arizona, by their chiefs, headmen, and members of said tribes, embracing a majority of all the male adult indians occupying said reservation, witnesseth:

ARTICLE I.

Lands ceded.

That the said Indians do hereby cede, grant, and relinquish to the United States all right, title, and claim which they may have in and to all the land embraced within the following-described tract, now a part of the said San Carlos or White Mountain Indian Reservation, to wit:

All the land lying south of a line, commencing at a point on the present eastern boundary of the said reservation, one mile south of Goodwin Spring; thence in a general direction west to the highest point on Mount Turnbull; thence in a westerly direction to a point on a line between the agency building proper and Stanley, or the Saddle butte, seven miles from said building in a southerly direction; thence in a western direction at longest possible tangents to the mouth of Hawk Canyon, not crossing said canyon; thence down the Gila River, following the south bank to a point where said Gila River crosses the present western boundary of the reservation.

ARTICLE II.

Consideration.

That in consideration of the lands ceded, relinquished, and conveyed, as aforesaid, the United States stipulates and agrees to place in the Treasury of the United States to the credit and for the sole benefit of the said Apache, Mohave, and Yuma Indians and to account therefor annually, to them through their agent, the net proceeds accruing from the disposal of such coal and mineral lands, lying

within the ceded territory, under the laws applicable thereto; and that said money shall be paid to them in cash from time to time as the same shall become available, pro rata, share and share alike, to each man, woman, and child of the tribes now living upon and entitled to the privileges of the said reservation:

Prior claims barred.

Provided, That none of the money credited to said Indians under this agreement shall be subject to the payment of any claims, judgments, or demands against said Indians for damages of depredations, claimed to have been committed prior to the signing of this agreement.

ARTICLE III.

Survey, etc.

That for the purpose of segregating the ceded land from the diminished reservation the new boundary line described in article one of the agreement shall be properly surveyed and permanently marked in a plain and substantial manner by prominent and durable monuments; and that the cost of said survey shall be chargeable to and be paid out of the proceeds of said ceded lands.

ARTICLE IV.

Ratification.

This agreement shall not take effect and be in force until ratified by the Congress of the United States.

Dated and signed at San Carlos Agency, Arizona, on the twenty-fifth day of February, one thousand

eight hundred and ninety-six.

PROVINCE McCORMICK,
United States Indian Inspector.

The foregoing articles of agreement having been fully explained to us in open council, we, the undersigned chiefs, headmen, and members of the several bands of Apache, Mohave, and Yuma Indians, attached to and receiving rations at the San Carlos Agency, in the Territory of Arizona, do hereby consent and agree to all the stipulations therein contained.

Witness our hands and seals at San Carlos Agency, Arizona, this twenty-fifth day of February, one thousand eight hundred and ninetysix.

(Here follows six hundred and three signatures of the adult male Indians of the San Carlos Reservation.)

Witness:
ALBERT L. MYER,
Capt. Eleventh Infantry,
Acting Indian Agent.

D. G. CHEESMAN,
Agency Clerk.

We hereby certify that the foregoing articles of agreement were carefully read and explained to the Indians, parties hereto, in open council, and were throughly understood by them before signing the same, and that the agreement was executed and signed

by said Indians at the San Carlos Indian Agency, in Arizona Territory, on the twentyfifth day of February, one thousand eight hundred and ninety-six.

JAMES STEVENS,
United States Special
Interpreter.

CONSTANT BREAD,
United States Agency Interpreter,
Apache.

MIKE BURNS,
United States Special
Interpreter.

ARTHUR DUCAT,
United States Agency Interpreter,
Mohave.

Witness:
ALBERT L. MYER,
Capt. Eleventh Infantry,
Acting Indian Agent.

D. G. CHEESMAN,
Agency Clerk.

I certify that the records of this office show that the total number of males on this reservation over eighteen years of age, according to last census, was eleven hundred and thirteen, of whom thirty are scouts in the United States service and permanently absent, leaving ten hundred and eighty-three.

ALBERT L. MYER,
Captain Eleventh Infantry,
Acting Indian Agent.

SAN CARLOS AGENCY, ARIZ.,
February 25, 1896.

I certify that the records of this office show ten hundred and eighty-three male adult Indians over eighteen years of age now residing on this entire reservation, and that the foregoing agreement has been duly signed by a majority thereof.

PROVINCE McCORMICK,
United States Indian Inspector.

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said agreement be, and the same is, accepted, ratified, and confirmed.

The Secretary of the Interior shall cause the said boundary line (estimated length forty-five miles), as described in article three of the agreement quoted and made a part of this Act, to be surveyed, marked, and established, by permanent and durable monuments of stone, the same to be set at each mile and half-mile point and at the angles formed on said line, and set, marked, and witnessed in conformity with instructions to be furnished by said Secretary of the Interior relating thereto; the compensation to be allowed for executing said survey not to exceed the sum of forty dollars per mile,

including monuments.

There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one thousand eight hundred dollars, or so much thereof as may be necessary, to carry into effect the provisions of the preceding section, said amount to be immediately available: Provided, however, That from the proceeds of the sale of the lands ceded by said agreement there shall first be deducted an amount sufficient to reimburse the United States for the expenditure authorized by this section.

That upon the filing in the United States local land office for the district in which the lands surrendered by article one of the foregoing agreement are situated, of the approved plat or survey authorized by this section, the lands so surrendered shall be open to occupation, location, and purchase under the provisions of the mineral-land laws only, subject to the several articles of the foregoing agreement: Provided, That the terms of this section shall not be construed to authorize occupancy of said lands for mining purposes prior to the date of filing said approved plat of survey: Provided, however, that any person who in good faith prior to the passage of this Act had discovered and opened, or located, a mine of coal or other mineral, shall have a preference right of purchase for ninety days from and after the official filing in the local land office of the approved plat of survey provided for by this section.

That the Secretary of the Interior is hereby directed to issue a patent in fee to Benjamin J. Clardy for all the land heretofore allotted to him in the Territory of Oklahoma, as a citizen Potta-

watomie Indian, and all restrictions as to the sale, incumbrance, or taxation of said land is hereby removed.

Approved, June 10, 1896.

3. Department of the Interior, Office of the Secretary, Order No. 2874 San Carlos Indian Reservation, Arizona.

DEPARTMENT OF THE INTERIOR
Office of the Secretary
[Order No. 2874]
SAN CARLOS INDIAN RESERVATION, ARIZONA

Order for Restoration of Mineral, Oil and Gas Resources in Certain Lands
June 17, 1963

Whereas, pursuant to the provisions of the Act of June 10, 1896 (29 Stat. 321, 260), the lands described in the Agreement With The Indians of the San Carlos Indian Reservation in Arizona dated February 25, 1896 (29 Stat. 358), commonly known as the San Carlos Mineral Strip and comprising approximately 232,320 acres, were opened to occupation, location and purchase under the provisions of the natural land laws of the United States with the net proceeds from such disposal to be deposited to the credit of the San Carlos Apache Tribe, and

Whereas, there are now remaining undisposed of within this area subsurface interests which may be valuable to the Indians of said reservation, and

Whereas, the San Carlos Tribal Council has petitioned the Secretary to restore to tribal owner-

ship all such undisposed of subsurface interests, and the Suprintendent of the San Carlos Indian Agency and the Commissioner of Indian Affairs have recommended that the petition be granted, and

Whereas, a public hearing on the application of the San Carlos Indian Tribe for a restoration of the land in the San Carlos Mineral Strip was held in Globe, Arizona, February 10-12, 1960 and the transcript of this hearing and evidence submitted therein have been duly considered;

SECTION 1. Now, Therefore, by virtue of the authority vested in the Secretary of the Interior by sections 3 and 7 of the act of June 18, 1934 (48 Stat. 984), I hereby find that restoration to the San Carlos Apache Indian Tribe of the mineral, oil and gas resurces in all of the following described lands will be in the public interest, and the right, title and interest in and to all minerals, oil and gas resources in said lands are hereby restored to tribal ownership for the use and benefit of the San Carlos Apache Tribe of Indians, and are added to and made a part of the existing reservation, subject to any valid existing rights:

All those lands within the area comprising the aforemented San Carlos Mineral Srip as described in Article 4 of the aforementioned agreement dated February 25, 1896 and ratified by the act of June 10, 1896 (29 Stat . 321, 359), and as shown on the plats on file in the Bureau of Land Management.

This order shall not apply to any patented lands or any interest in any patented lands including subsurface interests in such lands) located within the Mineral strip.

Sec. 2. This order shall become effective

immediately upon the adoption by the San Carlos Apache Tribe of a resolution providing that operations under any lease of or permits to the mineral, oil or gas resources in the lands within the Coronado National Forest shall be subject to such administrative supervision by the Secretary of Agriculture as is reasonably necessary to prevent serious injury to the surface resources of the land in the Coronado National Forest, to the extent that such supervision does not prohibit the use of the surface, under accepted engineering or mining standards, for installation of mining equipment or machinery, building and maintaining roadways, free ingress and egress for mining and removal of subsurface resources to market, and the mining and removal of subsurface resources, including the sinking of shafts, driving tunnels or other standard mining methods, except that strip or hydraulic mining shall be permitted only if, and under conditions, approved by the Secretary of Agriculture: Provided, That such resolution is adopted within three (3) months after the date of publication of this order in the Federal Register.

James K. Carr,
Under Secretary of the Interior

[F.R. Doc. 63-6547; Filed June 20, 1963; 8:54 a.m.]

4. Department of the Interior, Office of the Secretary Order for Restoration of Surface Rights in Certain Lands, Dated January 16, 1969. Federal Register Doc. 69-946.

SAN CARLOS INDIAN RESERVATION, ARIZ.
Order for Restoration of Surface Rights to Certain Lands

Whereas pursuant to the provisions of the Act of June 10, 1896 (29 Stat. 321, 360), the lands described in the Agreement with the Indians of the San Carlos Indian Reservation in Arizona dated February 25, 1896 (29 Stat. 358), commonly known as the San Carlos mineral strip and comprising approximately 232,320 acres, were opened to occupation, location and purchase under the provisions of the mineral land laws of the United States with the net proceeds from such disposal to be deposited to the credit of the San Carlos Apache Tribe, and,

Whereas, there are now remaining undisposed of within this area surface interests which may be valuable to the Indians of said reservation, and,

Whereas, the San Carlos Tribal Council has petitioned the Secretary to restore to tribal ownership all such undisposed-of surface rights and interests in and to said lands, which the Area Director of the Phoenix Area Office and the Commissioner of Indian Affairs have recommended be granted,

Now, therefore, by virtue of the authority vested in the Secretary of the Interior by sections 3 and 7 of the Act of June 10, 1934 (40 Stat. 984; 25 U.S.C. 463,467), I hereby find that restoration to the San Carlos Apache Indian Tribe of the surface rights in the following described lands will be in the public interest, and the right, title and interest in and to said surface rights in said lands are hereby restored to tribal ownership for the use

and benefit of the San Carlos Apache Tribe of Indians, and are added to and made a part of the existing reservation, subject to any valid existing rights;

The surface rights in those lands within the area comprising the aforesaid San Carlos mineral strip as described in Article I of the aforementioned agreement dated February 25, 1896, and ratified by the Act of June 10, 1896 (29 Stat. 321, 358), and as shown on the plats on file in the Bureau of Land Management.

This order shall not apply to any patented lands or any interest in any patented lands located within the mineral strip.

STEWART L. UDALL
Secretary of the Interior

January 16, 1969.

[F.R. Doc. 69-946: Filed, Jan. 23, 1969, 8:49 a.m.]

5. Public Law 93-530, 88 Stat. 1711 December 22, 1974.

PUBLIC LAW 93-530
AN ACT

To authorize the Secretary of the Interior to purchase property located within the San Carlos Mineral Strip.

Be it enacted by the Senate and House of Representatives of the United States of America in Con-

gress assembled, That the Secretary of the Interior (hereinafter referred to as the "Secretary") is hereby authorized and directed to acquire through purchase within the so-called San Carlos Mineral Strip as of January 24, 1969, all privately owned real property, taking title thereto in the name of the United States in trust for the San Carlos Apache Indian Tribe.

SEC. 2. The Secretary is authorized and directed to purchase from the owners all range improvements of a permanent nature placed, under the authority of a permit from or agreement with the United States, on the lands restored to the San Carlos Apache Indian Tribe for the reasonable value of such improvements, as determined by the Secretary: Provided, however, That, if any such range improvements were constructed under cooperative agreement with the Federal Government, the reasonable value shall be decreased proportionately by the percentage of original Federal participation. Such permanent improvements shall include, but not be limited to, wells, windmills, water tanks, ponds, dams, roads, fences, corrals and buildings. The Secretary shall take title to such range improvements in the name of the United States in trust for the San Carlos Apache Indian Tribe.

SEC. 3. There are authorized to be appropriated for the purpose of this Act not to exceed $3,000,000 to be available without fiscal year limitation: Provided, That in no event shall any person receive total compensation under this Act in excess of $300,000: Provided further, That the Secretary shall make a fair determination of compensation for property acquired pursuant to this

Act: And provided further, That the Secretary shall make such appraisals and require the owners to present such documents as title, tax assessment, bills of sale, other paper, and other evidence which he may deem necessary for such determination.

Approved December 22, 1974.

7. 43 U.S.C. Sec. 315b Taylor Grazing Act

315b. Grazing permits; fees; vested water rights; permits not to create right in land

The Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time in accordance with governing law. Grazing permits shall be issued only to citizxens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws, and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands,

water or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is hereby authorized, in his discretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long as the emergency exists: Provided further, That nothing in this subchapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law. So far as consistent with the purposes and provisions of this subchapter, grazing privileges recog-

nized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands.

Historical Note

1976 Amendment. Pub.L. 94-579 substituted provisions authorizing fees to be fixed in accordance with governing law, for provisions authorizing fees to take into account public benefits to users of grazing districts over and above benefits accruing to users of forage resources and provisions requiring fees to consist of a grazing fee and a range-improvement fee.

1947 Amendment. Act. Aug. 6, 1947, provided for method to be used by the Secretary of the Interior in fixing the amount of grazing fees and by assessing a separate grazing fee and a range improvement fee.

Savings Provisions. Amendment by Pub.L. 94-579 not to be construed as terminating any valid lease, permit, patent, etc., existing on Oct. 21, 1976, see section 701 of Pub.L. 94-579 set out as a note under section 1701 of this title.

Legislative History. For legislative history and purpose of Act Aug. 6, 1947, see 1947 U. S. Code Cong. Service, P. 1638. See, also, Pub. L. 94-579, 1976 U. S. Code Cong. and Adm. News, P. 6175.

8. 28 U.S.C. Sec. 2501

Sec. 2501. Time for filing suit

Every claim of which the Court of Claims has

jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the General Accounting Office fails to act within six months after receiving the account. June 25, 1948, c. 646, 62 Stat. 976; Sept. 3, 1954, c. 1263, Sec. 52, 68 Stat. 1246.

8. A.R.S. §12-526.

A.R.S. Sec. 12-526 provides in pertinent part.

A person who has a cause of action for recovery of any lands, tenements or hereditaments from a person having peaceable and adverse possession thereof, cultivating, using and enjoying such property, shall commence an action therefore within ten years after the cause of action accrues, and not afterward. The peaceable and adverse possesion referred to above shall not embrace more than one hundred and sixty acres, including the improvements or the number of acres actually enclosed if less than one hundred and sixty acres is so enclosed, but

when such adverse possession is taken and held under some written memorandum of title other than a deed which fixes the boundaries of the possessor's claim and is duly recorded, such possession shall be construed to be coextensive with the boundaries specified in such instrument.

STATEMENT OF THE CASE

AND THE MATERIAL FACTS

Petitioners' are a family owning a parcel of land of 400.25 acres located near Safford, Arizona. The land is bisected by the southern boundary of the San Carlos Mineral Strip and is cut into two sections. 196.13 acres of fee land lie inside the Mineral Strip, and 204.12 acres lie outside the boundary line and outside the Mineral Strip. The United States is desirous of acquiring only the section inside the Mineral Strip (196.13 acres). The parcel contained a nice brick residence with two bedrooms, a bathroom, a fireplace and furniture. In addition, the house had a water well and a power plant. Butane gas was the source of power for the house. The house and well are located within the Mineral Strip boundary line.

The Alders purchased their fee lands in 1960, and also leased land from the United States under the Taylor Grazing Act. The federal leased land consisted of all or part of nearly 13 sections of land. Since 1960, the Alders used Goodwin Wash Road to get to their ranch, as their predecessors-in-interest had done.

The Alders also leased Range Unit No. 30, which consisted solely of federal leased land and no patented land. Six sections of federal leased land were located inside the Mineral Strip.

Approximately one-half of the fee land of Petitioners is located in the San Carlos Mineral Strip. The

Mineral Strip is an area of 232,000 acres which constituted part of the original San Carlos Indian Reservation. That reservation was created by Executive Order in 1872. However, many nonIndians believed the land contained valuable minerals and by agreement dated February 25, 1896, the Mineral Strip was ceded to the United States for exploration of the mineral resources. That treaty provided that the reservation lands would be open to occupation under the Mineral Law only.

Contrary to the treaty provisions, the United States, from 1896-1934, issued homestead patents covering some of the previously ceded lands in the Mineral Strip. Petitioners are successors-in-interest to those patents. The United States also erroneously ceded lands to the State of Arizona. The government first recognized its error in 1931 and on June 18, 1934, Congress passed the Indian Reorganization Act. Pursuant to that Act, on September 19, 1934, the Secretary of the Interior directed that all undisposed lands, including the San Carlos Indian Reservation, be withdrawn from disposal.

Petitioners purchased their land in 1960 and obtained assignments of the Taylor Grazing leases, in addition to the State of Arizona leases. Petitioners built and maintained existing improvements and operated a cattle ranch until the events in controversy.

On June 17, 1963, the Under Secretary of the Interior issued Order 2874 which restored to tribal ownership all "mineral, oil and gas resources" in the San Carlos Mineral Strip. That Order was made subject to "valid existing rights." On January 16, 1969, the

Secretary of the Interior restored the surface of the lands to the tribe, again "subject to valid existing rights."

As a result of the 1969 Order, the San Carlos Tribe, through the BIA took over the former Taylor Grazing Act leases and on July 1, 1973, ended all leases with non-Indians in the Mineral Strip. Petitioners as well as other ranchers were served with notices of eviction from the lease land. Petitioners ended their cattle operation at that time, but continued to use their patented lands and State lease lands with occasional interruption from the Tribe regarding permits required to be on the Reservation.

The next year, September, 1974, Congress passed Public Law 93-530, effective December, 1974, which Act directed the Secretary of the Interior to acquire through purchase and at "fair value" all privately held interests in the San Carlos Mineral Strip. The Act was passed because Congress felt that the Department of Interior acted contrary to law in homesteading the land and those who obtained the land and passed it on in good faith should not be made to suffer.

For the next three years, Petitioners awaited the Secretary's determination of fair value for their land and improvements. Petitioners received an appraisal dated January, 1977, valuing their land and improvements at $233,699.98. The appraisals dated January, 1977, used a valuation date of January 24, 1969.

Petitioners objected to the date of valuation, as well as the value of some improvements. The United

States reappraised some property but in a letter in 1979, refused to reappraise. Petitioners also contended that by acquiring the 196.13 acre portion of Section 27 with the house and well attached, the Government was rendering the other 204.12 acres useless. The Government contended it had no authority to purchase any more land than what was detailed in Public Law 93-530.

Petitioners brought suit in U.S. District Court in 1982, seeking to quiet title and for a writ of mandamus seeking to require the Secretary to pay fair value. The United States claimed sovereign immunity. The suit was transferred by Stipulation to the U. S. Claims Court.

The U. S. Claims Court held that Petitioners' claims under the Fifth Amendment were barred because the 1969 Order of Restoration landlocked Petitioners in an Indian reservation and effectively denied Petitioners' legal access to the patented lands as of 1969. The Court also held that Petitioners' claims under Public Law 93-530 were barred because Plaintiffs failed to show any increase in the value of the land from 1969 to present. The Court of Appeals affirmed the holding that Petitioners' claims under the Fifth Amendment were time-barred, not because of the 1969 Order of Restoration but because Petitioners' lost legal access to their patented lands when the Apache Tribe cancelled the Taylor Grazing Act leases in 1973.

Petitioners bring this Petition seeking redress and a ruling that the accrual of their cause of action for a Fifth Amendment taking did not accrue in 1969 or 1973, but rather 1977 when Plaintiff was first put on notice of

any adverse claim by the Government.

Serial Chronology of Events

1. 1872 -- San Carlos Apache Reservation created by Executive Order.

2. 1896 -- San Carlos Tribe and Congress enter into an Agreement authorizing part of the Reservation (known as the Mineral Strip) to be opened up "under the mineral laws" for the purpose of discovering expected minerals.

3. 1896-1934 -- Homestead Patents and Mineral Patents are issued by the United States Government to ranchers on the Mineral Strip.

4. 1934 -- Indian Reorganization Act passed.

5. September 19, 1934 -- Secretary of the Interior directed that all undisposed lands be withdrawn from further disposal.

6. 1960 -- Petitioners purchase their patented land and leases for Range Units 26 and 30.

7. 1963 -- Secretary of the Interior restores to tribal ownership all mineral and gas resources. This order is made subject to valid existing rights.

8. 1967 -- Two lawsuits by neighboring ranchers seeking to prevent the Secretary from further restoring the land to the Tribe are dismissed for lack of controversy.

9. 1969 -- Secretary of Interior restores all undisposed interests to the Tribe. This order does not affect patented lands, and is made subject to valid existing.

[Accrual of cause of action by Claims Court].

10. July, 1973 -- The Tribe cancels all leases with non-Indians on lands formerly leased under Taylor Grazing Act. Petitioners lose their Taylor leases for land within the San Carlos Mineral Strip.

[Accrual of cause of action by Court of Appeals].

11. September, 1974 -- Congress passed Public Law 93-530, effective December, 1974, directing the Secretary of the Interior to purchase all privately held interests in the San Carlos Mineral Strip, including improvements on federal leased land.

12. January, 1977 -- Appraisals are submitted to the Bureau of Indian Affairs. During the year, Petitioners receive their appraisals with contract. Appraisals were conducted in 1976, but date of valuation is January 19, 1969.

13. 1977 -- Petitioners object to date of valuation and amount of valuation and ask for a re-evaluation.

14. 1978 (approximately) -- Petitioners receive minor adjustments in value.

15. April, 1978 -- State of Arizona and U. S. Government agree that state's title is void ab initio, and State agrees to select other Government land in lieu of lands within the San Carlos Mineral Strip.

16. 1979 -- Government refuses to re-appraise.

17. 1982 -- Alders file suit in U. S. District Court.

REASONS AND ARGUMENT FOR GRANTING THIS PETITION

I. THE COURT OF APPEALS DECISION IS CONTRARY TO THIS COURT'S DECISION IN U.S. V. DICKINSON AND ESTABLISHED PRECEDENT OF 40 YEARS.

The applicable statute regarding the period of limitations is 28 U.S.C. §2501. In this case, the applicable period is six years from the date "after the claim first accrues". The issue at bar is when did Petitioners' claim first accrue so as to start the running of the statute. The Court of Appeals for the Federal Circuit affirmed the Claims Court's alternative holding that Petitioners had notice of the Government's claim to their patented lands no later than July, 1973. The Court reasoned that when the San Carlos Tribe canceled Petitioners' grazing leases, Petitioners were on notice that a "taking" of their base ranches and permanent land improvements had occurred. Therefore, the Court held Petitioners should have instituted suit no later than July, 1979.

In United States v. Dickinson, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947), this Court held that the six-year statute of limitations does not begin to run against a landowner until a servitude has been acquired either by agreement or in the course of time. In Dickinson, the Court held that the statute of limitations is not a technical rule of law to be applied, but one of

practical application. Dickinson was a case involving flooding of lands; specifically, it dealt with the question of when a cause of action accrues on a claim of inverse condemnation. The facts of the case are as follows: In order to improve the navigability of the Kanawha River, West Virginia, Congress authorized construction of the Winfield Dam, South Charleston (Act of August 30, 1935, 49 Stat. 1028, 1035, in connection with H. Doc. No. 31, 73d. Cong., 1st Sess., pp. 2-4). The water above the dam was to be impounded to create a deeper channel and to raise the river pool level in that area. Notice of the proposed pool elevation was given to abutting landowners on July 1, 1936, and the dam was completed and officially accepted by the United States on August 20, 1937. The river was to be raised by successive stages from 554.85 feet to 566 feet above sea level. That final level of 566 feet was not reached until September 22, 1938. As a result of the raising of the river, the land owned by the respondents was permanently flooded. In addition, erosion attributable to the improvement damaged the land which formed the new bank of the pool.

The principal argument by the United States on appeal was that the action was barred by the applicable statute of limitations, which was six years. The complaints were filed on April 1, 1943. The government argued that the statute began to run on October 1, 1936, when the dam began to impound water. In any event, it maintained that the six years began to run no later than on May 30, 1937, when the dam was fully capable of operation, the water was raised above its normal level, and

the property of the respondents was partially submerged for the first time. While according to the latter view, 'the time for taking had not run, under the statute, Dickinson's claim would be barred because he acquired the land after that date.

The Court rejected the Government's claim. In an opinion by Justice Frankfurter, the Court stated at 747-8:

> "The Government could, of course, have taken appropriate proceedings to condemn as early as it chose both land and flowage easements. By such proceedings it could have fixed the time when the property was 'taken'. The government chose not to do so. It left the taking to physical events, thereby putting on the owner the onus of determining the decisive moment in the process of acquisition by the United States when the fact of taking could no longer be in controversy."

The Court noted that a claim of inverse condemnation traces back to the prohibition of the Fifth Amendment, "nor shall private property be taken for public use, without just compensation" and stated that the Constitution is "intended to preserve practical and substantial rights, not to maintain theories". Quoting Davis v. Mills, 194 U.S. 451, 24 S.Ct. 695, 48 L.Ed. 1067 (1904).

In Dickinson, the Court held that the phrase "cause

of action'' should be interpreted in accordance with the facts of individual cases, pointing out the danger of an inflexible and strict interpretation. In Davis v. Mills, supra, the Court commented that ''cause of action'' is one of the most theory-ridden of legal concepts and that is has ''shifting meanings''. The Court recognized the ''danger of determining rights based upon definitions of a cause of action unrelated to the function which the concept serves in a particular situation''. U. S. v. Memphis Cotton Oil Co., 288 U.S. 62, 53 S.Ct. 278, 77 L.Ed 619 (1933), Dickinson at pg. 748. In holding that Dickinson's claim was not barred, the Court fashioned a rule based upon the certainness of damages. See 748-49:

> ''Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time. The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'cause of action' - when they are born, whether they proliferate, and when they die. We are not now called upon to decide whether in a situation like this a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or

> have, from that moment, the statute of limitations run against him. If suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him - for instance, the uncertainty of the damage and the risk of res judicata against recovering later for damage as yet uncertain. The source of the entire claim - the overflow due to rises in the level of the river - is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. An owner of land flooded by Government would not unnaturally postpone bringing a suit against the Government for the flooding until the consequences of inundation have so manifested themselves that a final account may be struck."

So too, a rancher unsophisticated in the law "would not unnaturally postpone bringing a suit ... until the consequences of [trespass] have so manifested themselves that final account may be struck". In this case, just as in Dickinson, the Government has put the onus of determining the exact moment of taking on Petitioners. The decision of the Appeals Court puts the onus on the ranchers of knowing or realizing that the United States

was making a claim on their land on July of 1973[1]. The Court's reasoning is erroneous as it casts upon Petitioners the burden of knowing the exact date the taking took place, which commences the running of the limitations period. Dickinson provides that the statute does not begin to run until the equivalent of a prescriptive easement is acquired, as between private parties. In Arizona, adverse possession takes ten years. See: A.R.S. §12- 526.

The Appeals Court ignores the rationale of the Dickinson court which held that a landowner is permitted to wait, when the Government chooses not to condemn land, until all of his damages are ascertainable. In the case at bar, July 1, 1973 was only one of a series of acts affecting Petitioner's land holdings and improvements. In 1973, Petitioners' leases were terminated by the Tribe and the Bureau of Indian Affairs. At that time, it appeared that Petitioners would not be paid for their improvements on federal land under the general rule that improvements on Taylor Grazing lands are not compensable. The Petitioners' land and improvements were valued at $233,699.88 by Government appraisers, using a 1969 valuation date. In December of 1974, Congress provided that all of the fee land and all of the improvements would be

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[1] The fact that the Court of Appeals and the Claims Court differ as to the accrual of the cause of action illustrates the difficulty, if not the impossibility, of determining the precise moment of taking. The Government contended at trial that there had never been a taking, but if there was a taking, it occurred in 1969.

purchased by the Secretary of the Interior. In 1977, the first appraisals arrived, valuing land and improvements as of 1969. In 1978, Petitioners lost their State leases when the State of Arizona and the Federal Government entered into a consent decree. From 1977-1979, Petitioners lost their neighbors, all of whom settled with the Government and moved.

Under the rationale of Dickinson, Petitioners could not have known in 1969 or 1973 that they would subsequently lose their improvements or their State leases. Petitioners could not be on notice that the Government was going to acquire the neighbors' patented lands as well as their State leased land. Petitioners are entitled, under Dickinson, to ascertain the extent of the Government's actions causing them damage. It was not until 1977 that the Petitioners knew that the Government was valuing their lands and improvements as of 1969, eight years prior. Even then, the Petitioners lost the State-leased land through a consent decree in 1978, a fact which they could not have known prior to 1978[2].

The second reason that the Trial Court's finding affirmed by the Appeals Court is erroneous is that the Court is assuming that Petitioners are capable of making a legal conclusion. The statute of limitations, 28

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[2] The accrual of a cause of action is necessarily a notice that the Government is making an adverse claim on property. Every act prior to the appraisals being completed and submitted is an act recognizing Plaintiffs' interest in their patented lands as well as the right to compensation for their improvements.

U.S.C. §2501, uses an objective notice standard and one which applies to a landowner, not a lawyer. The trial court's conclusion that Petitioners were put on notice no later than July, 1973 raises the standard of discovery to making a legal conclusion that the access to the property is no longer enforceable on an Indian reservation. As the Dickinson Court pointed out, the statute of limitations is one of practical application. To hold Petitioners accountable for knowing that Indian Tribes enjoy sovereign immunity is contrary to established precedent and good sense. There was no evidence submitted which showed that Petitioners knew of this legal conclusion or that their access was infringed. In fact, the evidence indicated that Petitioners continued to use their federal patented lands after 1973 without incident. Petitioners cannot be said to have been put on notice.

Nevertheless, the Appeals Court refused to so hold, instead it interpreted the series of Governmental and Tribal Acts occurring on or before July, 1973, as giving Petitioners notice that a taking had occurred.

The Court stated:

> "...[I]n July of 1973, they lost all grazing permits from the San Carlos Tribe, and were obliged to discontinue all ranching operations; they had no right to use the access road across tribal lands and they conceded their fee land had no market or mortgage value. The situation had become stabilized."

As is discussed infra, at 23, the taking of grazing permits by the Government or the Tribe, because such permits add nothing to the value of base ranch lands, and are not compensable interests in themselves, did not and could not have amounted to a taking. Therefore, no notice can be imparted to Petitioners that a taking had occurred. Furthermore, it is undisputed that Petitioners continued to live on their properties and had access to their properties until they moved away in 1978. Surely Petitioners were not put on notice that their property had been taken when their right of access was "destroyed", because, as a practical matter, their right of access had not been destroyed.[3] The 1969 Order specifically provided that interests in patented lands were not affected. Conceding that their fee lands had no market or mortgage value is merely a recognition by Petitioners that in retrospect the United States was in the process of acquiring the San Carlos Mineral Strip for the San Carlos Tribe and the United States was the only potential purchaser. Such admission cannot be construed as more than that. In point of fact, Alders' neighbors (by about 20 miles) actually received an offer to buy in 1978. A recognition that Government action would eventually result in transfer of all lands to the Tribe naturally

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[3] Petitioner's contentions at trial have risen to the level of established fact. There is good authority that both the Bureau of Indian Affairs and the San Carlos Tribe could be enjoined from depriving access. Sovereign immunity may not be a defense to a request for equitable relief. It is difficult to imagine that Petitioners should have been on notice of any of these legal implications in 1973.

leads to a conclusion that the private market for Petitioners' land was non-existent. Such a recognition is not the equivalent of notice that there had been a taking under the rationale of Dickinson. The Appellate Court ignores the language of the 1969 Order of Restoration which specifically denies any adverse impact on patented land. The 1969 Order amounts to no more than a disclaimer deed or a quitclaim deed.

The Appeals Court concluded that "under Dickinson and related authority, the cause of action had accrued by July, 1973." Dickinson, as applied to the case at bar cannot be so interpreted.

In Dickinson, the Court indicated:

> "When dealing with a problem which arises under such diverse circumstances, procedural rigidities should be avoided. All that we are here holding is that when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really 'taken'". Id, at 749.

In the case at bar, the Government commenced the return of these lands as far back as 1941, with proclamations dating 1963 (sub-surface) and 1969 (surface). The Government commenced acquisition in 1974 by a continuing process of physical and legal events. Public Law 93-530.

The appraisals started in 1974 and were completed in 1977 to 1979. Petitioners did not lose income from their ranching operation by ceasing their operation until 1973. The State lease land was acquired by consent decree in 1978, thus depriving Petitioners of that land in 1978. Petitioner, Rodney Alder's, hired hand moved off the land in 1978. In such a situation, when the Federal Government engages in a course of conduct resulting in a taking by a series of acts as in Dickinson and the case at bar, the burden of deciding when that taking occurs should not be harshly cast upon the landowner to decide the precise moment of taking. The final account was not struck until 1978 when Petitioners' last property was taken.

The accrual of Petitioners' cause of action is further complicated by the passage of Public Law 93-530, which required and directed the Secretary to appraise and purchase all of Petitioners' land and improvements within the San Carlos Mineral Strip. That law is a recognition of Petitioners' claim and interest, not a denial nor an adverse claim. The statute of limitations should not run during the time the Secretary was appraising Petitioners' interests. See discussion, infra at 29. At no point had a final account been struck prior to 1978. Dickinson holds that a landowner should not be the one to make the decision as to the precise moment. The Court of Appals has held otherwise, contrary to Dickinson and 40 years of accepted precedent.

A similar situation was decided previously in Silverberg v. United States, 155 Ct.Cl. 436 (1961). In that case, slaughtering plants had been ordered beginning in

1943 to set aside and deliver certain quantities of beef to the armed services at maximum wholesale prices fixed by the Office of Price Administration. The order remained in effect until 1946. Suit was brought in 1951 for the difference between the wholesale price and the retail ceiling price. The court held that the action was not barred by the six-year statute of limitations. The taking was held not as a series of separate transactions, but rather pursuant to a continuous set-aside order. As in Dickinson, the court held that Petitioner was not required to institute a suit within six years of the first taking and then another suit for subsequent takings.

Dickinson has been followed in a long line of cases to the present day. As far as Petitioners' research indicates, Dickinson remains the leading case concerning when a cause of action accrues where the Government intentionally or inversely condemns land or property. Dickinson strikes a balance between the private sector and the public sector where the Government chooses to acquire property by gradual dispossession, without condemning the property before hand.

In Castro v. United States, 500 F.2d 436 (Ct.Cl. 1974), the Court of Claims held that an action filed in 1968 was not time barred where it sought damages for the Government's destruction of 800 coconut trees on the island of Saipan. In 1944, the U. S. Government proclaimed a Military Government which was to respect private property rights. The coconut trees were destroyed in the invasion of 1944. However, Petitioner was not free to return to his property in an unrestricted manner until

1968. The Court held that 1968 was the proper date for the filing of Petitioner's claim for the loss of occupancy of his lands and his trees, holding that only then could Petitioner ascertain a final account. Accord: Oro Fino Consolidated Mines, Inc. v. United States, 92 F. Supp. 1016, 118 Ct.Cl. 18(1950), cert. denied, 341 U.S. 948, 71 S.Ct. 1015, 95 L.Ed. 1371 (1951); Avery v. United States, 330 F.2d 640,165 Ct.Cl. 357 (1964); Aaron v. United States, 311 F.2d 655, 167 Ct.Cl. 818 (1964); and Klein v. United States, 152 Ct.Cl. 221 (1961). See also: Terteling v. United States, 334 F.2d 350, 167 Ct. Cl. 331 (1964) involving a claim for damages arising from a continuing breach of contract.

The rule of law set forth in Dickinson is controlling and dispositive of the issue of the statute of limitations and the accrual of Petitioners' cause of action. The Court of Appeals' decision, being in direct contravention, must be overturned.

Petitioners are entitled to wait until all of the damage has been ascertained, which did not take place until 1978. The Government's acquisition of all other private lands, with the exception of Petitioners' was not consummated by the Government until 1979, the year the statute of limitations presumably ran. It should be remembered that at trial the Government contended there had been no taking at any time.

II. THE COURT OF APPEALS' DECISION COMMENCES THE RUNNING OF THE STATUTE OF LIMITATIONS BEFORE A COMPENSABLE EVENT HAS OCCURRED AND IS CONTRARY TO U.S. V. FULLER, 409 U.S. 488 (1973)

A. THE STATUTE OF LIMITATIONS CANNOT BEGIN TO RUN ON THE TAKING OF A NON-COMPENSABLE INTEREST IN REAL ESTATE

Petitioner's land holdings included over 6400 acres of land formerly leased under the Taylor Grazing Act, as well one section of state lease land.

Under the Taylor Grazing Act, 48 Stat. 1270, as amended, 43 U.S.C. §315(b), one acquires no compensable interest in leased land. The Act states that its provisions "shall not create any right, title, interest or estate in or to the lands." Id. Under the Taylor Grazing Act, ranchers have never been compensated for the taking of permitted use of grazing lands. Similarly, ranchers have never been compensated for the taking of improvements on permit lands.

This Court held in United States v. Fuller, 409 U.S. 488, 93 S.Ct. 801, 35 L. Ed.2d 16 (1973), that in determining the fair value of a base ranch which was condemned by the United States, the value of the base ranch attributable to its proximity to Taylor Grazing Act permit

lands could not be taken into account in the valuation of the base ranch. Writing for this Court, Justice Rehnquist stated that "the Fifth Amendment does not require the Government to pay for that element of value based on the use of respondent's fee lands in combination with the government's permit lands." Fuller, supra. Yet the Court of Appeals' opinion makes the taking of the former Taylor Grazing lands the triggering event which caused the accrual of Petitioners' cause of action.

The Court of Appeals for the Federal Circuit held that Petitioner's claims were barred by 28 U.S.C §2501, which bars claims six years after they accrue. The Court of Appeals held that Petitioners' claims accrued when their Taylor Grazing leases were canceled in July 1973, because the value of Petitioners' fee lands were decreased by the loss of the Taylor Grazing lands. The Court of Appeals' holding is in direct contravention of this Court's holding in United States v. Fuller 409 U.S. 288, 93 S.Ct. 801, 35 L.Ed.2d 16 (1973). In Fuller, Justice Rehnquist, writing for the majority, stated at 22:

> "The provisions of the Taylor Grazing Act quoted supra make clear the congressional intent that no compensable property right be created in the permit lands themselves as a result of the issuance of the permit. Given that intent, it would be unusual, we think, for Congress to have turned around and authorized compensation for the value added to fee lands

> by their potential use in connection with permit lands. We find no such authorization in the applicable congressional enactments."

It is certainly much easier to see in 1984 what the government's purposes and intents were ten years previous by having the benefit of history. However, in 1973, when the Court of Appeals presumes the commencement of the statute of limitations, all Petitioners knew was that the government had restored the 200,000 acres of land in the San Carlos Mineral Strip to the Apache Tribe subject to Petitioners "valid existing rights", that Petitioners would no longer have their Taylor lease lands, and that the Order did not affect patented lands.

In 1973, all that Petitioners had was a complaint but no cause of action. Fuller declared that Petitioners could not sue for the loss of the lease land, nor could they contend the value of their base land was adversely affected by the loss of the federal lease lands. Nor could Petitioners complain that their improvements on their federal lease lands were taken. The law did not recognize Petitioners right to compensation for their improvements which they had placed on their Taylor Grazing lease land, yet the Court of Appeals commences the accrual of Plaintiffs cause of action concurrent with the loss of the Taylor Grazing leases.

B. THE COURT OF APPEALS DECISION THAT PETITIONER'S EASEMENT OF INGRESS AND EGRESS WERE TAKEN BY THE 1969 ORDER OF RESTORATION IS CONTRARY TO THE LANGUAGE OF THE ORDER.

If the Court of Appeals is correct, what were Petitioners to sue for in 1973? Fuller held that Petitioners had no right to compensation for loss of the permit lands. The order of restoration in 1969 says that Petitioners vested rights are not affected nor are their patented lands affected. Yet the Court of Appeals held that by 1973 Petitioners had no right of access to their lands. If the Secretary did not intend to affect patented lands, it follows that Petitioners' right of access was not infringed, since easements of ingress and egress are part of the property right to land. Since the Order of Restoration clearly states that the order is both subject to valid existing rights and clearly states that the Order does not affect patented land nor to any interest in patented lands, one could properly assume that Petitioners still retain an easement of ingress and egress contrary to the opinion of the Court of Appeals.[4]

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[4] Petitioners also extensively briefed the issue of easement by implication and necessity. See e.g. Kirscheiff v. United States, 586 F.2d 159 (10th Cir. 1978), Superior Oil Co. v. United States, 358 F.2d 34 (9th Cir. 1965), and United States v. Dunn, 478 F.2d 443 (9th Cir. 1973), holding the landlocked Plaintiffs were entitled to a trial on a claim of easement by necessity over Government lands.

Under the Court of Appeals' logic, Petitioners would be pressed to sue for a taking of their patented lands, an act which the 1969 order logically denies. The 1969 Order of Restoration amounts to a disclaimer of interest by the United States in both the patented land and hence the easements of ingress and egress. Such reasoning defies logic and the equitable principle which formed the basis of the Court's opinion in Fuller.

The 1969 Order of Restoration expressly provides that it does not affect patented lands and further provides that it is subject to valid existing rights. No evidence was presented nor could any be presented that Petitioner did not have valid existing rights of ingress and egress. If in fact the Petitioners' rights of access were cut off in 1969, the United States should be estopped from any such claim. Petitioners continued to use the roads for access, and at trial, the B.I.A. representative testified that the roads in question were open to the public. Even if the access was cut off, Petitioners were certainly led to believe their rights were not affected. And if equitable principles are indeed applicable to condemnation proceedings, and presumably inverse condemnation proceedings, there is absolutely no equity in holding that what the government led Petitioners to believe to be true in 1969 was not in fact true, all to the detriment of Petitioners.

The Court of Appeals' holding that Petitioners lost their rights of access is without basis in equity and without basis in the record below. No government should be allowed to lead its citizens to believe that what the

government claims not to be affected has in fact been affected all to the detriment of its citizens, and to the benefit of the government.

C. PETITIONERS HAD NO COMPENSABLE INTEREST WHICH WAS TAKEN UNTIL THE PASSAGE OF PUBLIC LAW 93-530 EFFECTIVE DECEMBER, 1974

1. Improvements on Taylor Grazing Land.

This Court stated in Fuller, supra, that:

> "Congress may, of course, provide in connection with condemnation proceedings that particular elements of value or particular rights be paid for even though in the absence of such provision the Constitution would not require payment." Fuller, at 22.

Congress did provide, in this case, that "particular elements of value" be paid for. Public Law 93-530 made an exception to the general rule of noncompensability and provided that ranchers would be compensated for the value of permanent improvements on their permit lands. Section 2 of Public Law 93-530; 88 Stat. 1711 provides:

> "The Secretary [of the Interior] is authorized and directed to purchase from the owners all range improvements of a permanent nature placed under the authority of a permit from or agreement with the United States, on the lands restored to the San Carlos Apache Indian Tribe for the reasonable value of such improvements, as determined by the Secretary ..."

Public Law 93-530 created a clear exception to the long established rule that the Fifth Amendment does not require compensation for the "taking" of improvements on federal permit grazing lands. Absent Public Law 93-530, no Fifth Amendment "taking" claim accrued in Petitioner's owners when their improvements on Federal permit lands are taken. And it is only by virtue of the language and narrow applicability of Public Law 93-530 that Petitioners Alder have a statutorily grounded claim for compensation for improvements placed on these permit lands.

Because taking of range improvements absent Public Law 93-530 is not compensable under the Fifth Amendment, there was no Fifth Amendment claim on which the six-year statute of limitations contained in 28 U.S. C. §2501 could run prior to the passage of the Act. The Federal Circuit Court of Appeals erred when it affirmed the Court of Claims' holding that the Petitioners' Fifth Amendment claim for compensation for improvements accrued no later than July 1973 when the San Carlos Apache Tribe canceled the grazing permits. Holding that Petitioner's cause of

action accrued no later than 1973, the Court of Appeals ruling commences the period of limitations before Petitioners had a compensable interest! It was not until December 22, 1974, that Public Law 93-530 became effective and gave Petitioners a right to compensation for permit land improvements. This ruling is not only inequitable, but constitutes deprivation of due process to the extent that it strips Petitioners of a right to compensation by barring a claim before it accrues. How could Petitioners in 1973 be charged with knowledge that Congress would change the general rule of noncompensation for Taylor Grazing improvements in 1974?

2. Base Ranch Fee Lands

The same analysis is applicable to the holding of the Claims Court that Petitioners' cause of action under the Fifth Amendment for compensation for the taking of the base ranch fee lands also accrued on July 1, 1973.

The Claims Court reasoned that when the San Carlos Tribe canceled the grazing permits, that action, in itself, constituted a taking of the base ranch fee lands. The Court of Appeals affirmed this erroneous holding.

As discussed above, the "taking" of Taylor Grazing Act permit lands is not compensable under the Fifth Amendment. And as this Court held in United States v. Fuller, supra, no compensable value may be attributed to base ranch fee lands by virtue of their proximity to

Taylor Grazing Act permit lands. It follows, therefore, that the revocation of permits to the grazing lands by the San Carlos Apache Tribe did not in any way diminish the value of Petitioners' base ranches for purposes of the Fifth Amendment[5]. Yet the Court of Appeals, contrary to this Court's holding in Fuller, held that the statute of limitations commenced to run at that time. Without a legally cognizable dimunition of the fee lands, there was no cause of action against which the statute of limitations in 28 U.S.C. §2501 could run.

3. State Lease Lands

The Court of Appeals erred in affirming that the Petitioners' right to compensation for state lease lands was time barred as of 1973. At the earliest, a taking of their Fifth Amendment compensable interests in state land improvements and lease lands occurred in 1978 when the State of Arizona agreed to a consent decree that its claim was void ab initio in return for equal acreage elsewhere in the State of Arizona. How can Petitioners' claim accrue in 1973 for the taking of the state lease

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[5] As a practical matter, the value of the base ranches was diminished when the grazing permits were revoked, but this is irrelevant to the question of whether a Fifth Amendment compensable taking of the base ranches had occurred because there was no cognizable diminution in value of the base ranches, there can have been no taking on July 1, 1973.

land when Petitioners had use of land or improvements until 1978 when the consent decree was signed and Petitioners' 10 year leases were canceled. Fuller did not address the applicability of state leases on the values of patented land, and it would appear that valuing the patented land together with the state lease land would be proper. This diminution in value did not occur until 1978, one year before Petitioners' claim was lost according to the Court of Appeals. Thus, no final balance had been struck. Had Petitioners sued in 1973 and settled or gone to judgment, their claim for taking state lease lands or improvements would be barred by res judicata.

III. THE COURT OF APPEALS' DECISION HOLDING THAT 1969 IS THE DATE OF VALUATION OF PETITIONERS' PROPERTY INTERESTS PURSUANT TO PUBLIC LAW 93-530 AMOUNTS TO AN UNCONSTITUTIONAL DEPRIVATION OF JUST COMPENSATION AND IS CLEARLY ERRONEOUS

The first paragraph of Public Law 93-530; 88 Stat. 1171 reads as follows:

> "The Secretary of the Interior (hereinafter referred to as 'Secretary') is hereby

> authorized and directed to acquire through purchase within the so-called San Carlos Mineral Strip as of January 24, 1969, all privately owned real property, taking title thereto in the name of the United States in trust for the San Carlos Apache Indian Tribe."

No act of Congress will be read as intending to violate the Constitution by legislative fiat. When Congress passes a law, it will be presumed that the law should be read in conformity to the Constitution. United States v. Vuitch, 402 U.S. 62, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971).

Public Law 93-530 was passed in response to the widespread dissatisfaction of the Arizona ranchers who were adversely affected by the loss of their lease lands and ranch operations. Congress intended that those ranchers be bought out at "today's prices". The committee notes state:

> "The Committee however believes that the Department's position against compensation for base properties does not stand up to analysis. Numerous laws, including the Indian Reorganization Act, clearly authorize the purchase by the United States of inholdings within Indian Reservations for the purpose of providing lands for Indians. Furthermore, the language in the Appropriations Act (the Act of October 4, 1973, 87 Stat 429) limiting this authorization

applies the limitation only to the States of Nevada, Oregon and Washington. The authorization continues in effect for reservation inholdings in Arizona. Finally, staff believes there would be no value as a precedent to any provision allowing purchase of Mineral Strip inholdings. Not only is the precedent already embodied in existing law, as noted directly above, but the facts in the Mineral Strip situation are sufficiently unique as to be easily distinguished from future inholding purchase requests. In most cases, the Federal Government allowed these Mineral Strip lands to go to patent for homesteading and other purposes despite the provision in the 1896 Act prohibiting disposal of the lands except under the mineral land laws. Clearly, the Department acted contrary to law in disposing of the land and those who obtained the land and passed it on in good faith should not be made to suffer. The Department should correct its mistake in law by purchasing back these inholdings at today's prices." [Emphasis added].

Both the Claims Court and the Court of Appeals interpreted the term 'today's prices', which is found in the Comments in 1974 to mean 1969 prices. Neither court cited precedent for its ruling, and not surprisingly, neither court addressed the issue of the increase in value which would be expected from 1969 to 1974. Since

the Government has never contended that Petitioners' do not have good title to their lands, there can be no authority for paying 1969 prices for land sought to be purchased in 1974, 1978 or 1986. To read Public Law 93-530 as mandating or permitting the valuation of property five years prior to the date of the legislation and nine years before the actual offer amounts to a taking of the increase in value of Petitioners' land without compensation. Acts of Congress cannot be read as authorizing such an unconstitutional act.

To say that Petitioners are free to refuse the offer ignores the practicalities of the present situation which has been in existence since 1978. Petitioners have no neighbors and no market for their lands. The Alders have had no offer and continue to make payments on their mortgage. The Government offered the Alders $150 per acre for farmland, but would not buy the remaining parcel, which is useless. Yet, Petitioners presented uncontradicted testimony that in 1984 they could not find a realtor to list the property nor a banker to mortgage the property.[6]

Public Law 93-530 must also be read in conjunction with the Fifth Amendment so as to effectuate the purchase at a fair value and so as not to deprive Petitioners of

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[6] By stipulation, the exhibits in *Alder* and *Bunrick* were allowed to be used in either case. The 1974 appraisal on Bundricks' land shows a value double to that which was given by Government appraisers. By analogy, it is logical to presume that Alders' land also had an increase in value commensurate with Bundricks' land, and would have doubled in value by 1974.

what Congress has promised and the Constitution guarantees. Both the Constitution and Public Law 93-530 promise that Petitioners' land will be purchased for fair value. And the testimony from Petitioners which was not controverted was that they expected the valuation to be current with the appraisal. Petitioners testified that the first notice of a 1969 valuation was receipt of the appraisals in 1977. Then, and only then, were Petitioners advised of an adverse claim which could start the running of the statute of limitations. Construing Public Law 93-350 as mandating the use of a price eight years old takes from Petitioners the right to the increase in value of their land from 1969-1977. If Congress intended to buy at a fair price, it must be construed with the expressed intent to buy at today's prices. The Constitutional definition of just compensation means full and perfect equivalent for property taken. Olson v. United States, 292 U.S. 246, 54 S.Ct.704, 78 L.Ed. 1236 (1934); United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed 336 (1943), reh denied 318 U.S. 798, 63 S.Ct. 557,87 L.Ed. 1162; Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 93 S.Ct. 791, 35 L.Ed 2d 1 (1973).

IV. THE COURT OF APPEALS DECISION REQUIRES JUDICIAL RESOLUTION OF A CASE WITHOUT CONTROVERSY AND A CASE WHICH WAS NOT RIPE FOR RESOLUTION

Assuming that Petitioners commenced a lawsuit prior to 1978, the probable disposition would be that there was no justiciable controversy. Congress provided under Public Law 93-530 that Petitioners were to be paid fair value for all of their patented land and improvements and that Petitioners were to receive a fair value. What issue was there to be decided? What controversy exists prior to the appraisals? Petitioners waited for three years, and then five years, for the appraisals and re-appraisals only to be told that they had waited too long, and any claim against the Government for taking of their property, including their state lease lands which were lost in 1978, was barred by the statute of limitations. Equitable principles require a different result.

The case of Friedman and its progeny are instructive. Petitioners concede that the Fifth Amendment claim would not as an ordinary matter be governed by an administrative tribunal. But where Congress authorizes and directs the Secretary of the Interior to do an act which satisfies Petitioners' Fifth Amendment claim, the accrual of that cause of action should be tolled until the Secretary determines "fair value" to see if in fact there is anything to decree. Petitioners should not be penalized for waiting.

It is established law that where the Defendant has set up an administrative procedure for valuing claims, the statute of limitations is tolled. Here, Petitioners waited from 1974 to 1978 to receive appraisals. Reappraisals did not arrive until 1979. The testimony of the B.I.A. agent shows that upon his arrival, he was to set up appraisals for improvements and patented lands. Those appraisals were followed to the letter. The Defendant relied solely upon the appraisal and Defendant alleges to have paid neither more nor less than the appraised price. Public Law 93-530 directs the Secretary of Interior to purchase all privately held interest on the San Carlos Mineral Strip. Under Public Law 93-530, he is directed "to make such appraisals as he may deem necessary". He shall "make a fair determination of compensation" for the property acquired under the Act. No court can require more than "fair value".

In Friedman v. United States, 159 Ct. Cl. 1, 310 F.2d 391 (1963) the Court held that where Congress has delegated the issue of determining a claimant's entitlement to some sort of pay to an official, the cause of action does not accrue until the official has acted or refused to act. Until the official has made a final decision, the statute of limitations is tolled.

Under Public Law 93-530, Congress has delegated authority to the Secretary of the Interior to make determinations of value for the patented land and improvements throughout the Mineral Strip. The Act mandates that the Secretary determine "fair value". There is a statutory scheme for determination of Petitioners' claims, which

claims are the same claims as Petitioners have under the Fifth Amendment.

In Friedman, the Court noted that there are some cases where Congress has deliberately given an administrative body the function of deciding all or part of the claimant's entitlement and has interposed an administrative agency between the claim and the courts. These cases include claims where a demand upon the Secretary is necessary.

Clearly, Congress delegated authority to the Secretary under Public Law 93-530. Not only is the Secretary directed to purchase, he is directed to "make a fair determination of compensation for property acquired pursuant to this Act." The Secretary is instructed to make a fair determination and to require presentation of evidence. He is further authorized to have the land and property appraised. Until the Secretary has completed these duties and made a final decision, Petitioners' action under the statute, and hence the Fifth Amendment would not be ripe.

In point of fact, two previous lawsuits which pertain to this Reservation were dismissed for lack of a controversy. The legislative notes to Public Law 93-530 summarize the litigation:

> "During the pendency of the Tribe's application for restoration, a number of the ranchers who had testified against restoration at the Globe hearing filed an action in Federal Court to block the restoration. The action, in

> which the State of Arizona later intervened as a party Petitioner was finally dismissed when the Court held that there was no case over which it could assume jurisdiction. In ordering the dismissal, the Court reasoned that there was no controversy because, first, the Tribe had withdrawn its application for the restoration of the surface, and second, Secretarial Order No. 2874 had been made subject to valid existing rights and had also specifically excluded patented lands and the surface of the Mineral Strip (Bowman v. Udall, 243 F. Supp. 672 (D.D. Cir. 165), aff'd sub. nom. Hinton v. Udall, 364 F.2d 676 (D. D.Cir.), cert. denied 385 U.S. 878 (1966)."

Two other ranchers previously had their lawsuits dismissed because their suits did not present a controversy. Since the 1963 Order had been subject to valid existing rights' there was no case. Yet, the 1969 Order, which had the same language, is now called the triggering act which gave Petitioners' leased land to the Apache Indian Tribe, and because Petitioners lost their leases.

Petitioners' problem is either one of filing too soon or too late. On the one hand, a lawsuit filed within six years of January, 1969, or January, 1975, would certainly be subject to dismissal on the grounds that there is no controversy. Having passed Public Law 93-530, the Government is saying that it will pay fair value for all of the land and improvements. A court

cannot order any more than payment of fair value, whether the basis be the Constitution or statute. It is only where a dispute arises over what is fair value that a case or controversy exists for adjudication. Until the appraisals arrived in December, 1977 there was no dispute to adjudicate.

To be a justiciable controversy, the facts must present a real and substantial question, admitting of specific relief through a judgment which is conclusive, as oppossed to mere opinion as to what the law would be upon a certain set of facts. Aetna Life Ins. co. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 81 L. Ed. 617 (1937), reh. denied 300 U.S. 687, 57 S.Ct. 667, 81 L.Ed. 889 (1937).

A justiciable case cannot be made by a proposed misreading of a statute and a claim of injury therefrom. Western Mining Council v. Watt, 643 F.2d 618 (9th Cir. 1981). And where the only possible harm which could result from the application of a new rule would be to future plaintiffs, a suit challenging its constitutionality is not considered ripe for adjudication. John v. Sikes, 730 F.2d 644 (11th Cir. 1984).

Friedman has been followed in a larger number of cases. See: Bruno v. United States, 556 F.2D 1104 (Ct. Cl. 1977); Garcia v. United States, 617 F.2d 218 (Ct.Cl. 1980); Dzialo v. United States, 677 F.2d 873 (Ct.Cl. 1982). In Bruno v. United States, supra, the Court held that where any administrative decision "is tentative or...withholds a final decision pending consideration of some new evidence, or expressly invites, on the record,

the Petitioner to seek a reopening at some later date", then as a matter of law the ..."decision is not final and the statute of limitations does not begin to run." Under the Bruno case, it can be seen that Public Law 93-530 was an act providing compensation subject to evaluation and appraisal by the Secretary of the Interior. As such, the statute of limitations could not begin to run until 1979 when the Secretary asked for no more information and refused to reappraise or reconsider its opinion. Only then did the administrative determinations required in Public Law 93-530 become final.

In Garcia v. United States, supra, a statutory requirement imposed upon an agency was held to toll the statute of limitations. Likewise, in Dzialo v. United States, supra, it was asserted that because of Friedman "no claim accrues ... until there has been an administrative determination of (Petitioner's) right". In the present situation, the Petitioners' rights as to their just compensation for their property was not administratively determined until 1978 or 1980. The Friedman rationale is clearly applicable in the present situation, and it was error for the trial court and the Court of Appeals to hold otherwise. The United States Claims Court in Gerber v. United States, 2 Ct.Cl. 311 (1983) itself cited both Dzialo, supra, and Friedman for the proposition that "no cause of action accrues until there has been an administrative determination of a claimant's right". That case, like Friedman, also applied to military or governmental disability or retirement pay.

Petitioners do not claim that a Fifth Amendment

inverse condemnation claim would be subject to an administrative tribunal. But where as here, Congress has authorized and directed the Secretary to appraise and purchase Petitioner's interest, postponing Petitioner's cause of action seems logical and equitable. The statute is tolled because the statute on its face requires compensation which satisfies Petitioners' Fifth Amendment claims. Until Petitioners realized that the Department intended to pay less than what Petitioners consider fair value, there was no case to adjudicate. One cannot presuppose the Secretary will read the law to authorize payment of a price 8-12 years old in 1981. Allowing Petitioners time to try to settle their claim through a non-judicial procedure would be consistent with federal jurisprudence requiring an actual case or controversy. The postponing of a lawsuit until the Secretary makes a final decision also seems judicious.

V. THE GOVERNMENT IS ESTOPPED FROM ASSERTING THE ALLEGED LACK OF ACCESS AS THE CAUSE OF ACCRUAL OF PETITIONERS' ACTION

The last paragraph of the 1969 order restoring the San Carlos Mineral Strip to the San Carlos Tribe states "This order shall not affect any patented lands located within the mineral strip." Based on this language, the

federal government should be estopped from asserting any loss of access, if indeed there was, as the applicable taking or the accrual of Petitioners' cause of action. Petitioners have been affirmatively misled into believing their lands were not affected. Several cases have held that estoppel may be asserted against the government only where there has been affirmative misconduct. This Court held in Schweiker v. Hansen, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981) that estoppel would not be asserted where a social security administration worker told a woman she was not eligible for benefits, when in fact she was. It was held that the conduct must be of such character so as to constitute "affirmative misconduct". See Schweiker, 101 S.Ct. at 1471. However, Schweiker has been read to allow the equitable estoppel theory against the United States.

In Johnson v. Williford, 682 F.2d 868 (9th Cir. 1982), it was determined that:

> "In general, equitable estoppel is not available as a defense against the government, especially when the government is acting in its sovereign, as opposed to its proprietary capacity. Nevertheless, this court has held that where justice and fair play require it, estoppel will be applied against the government, even when the government acts in its sovereign capacity if the effects of estoppel do not unduly damage the public interest. The Supreme Court has never explicitly endorsed this theory

> although no fewer than eight circuits have stated that there are some circumstances in which the government will be estopped." Johnson v. Williford, at 871.

In Hansen v. Harris, 619 F.2d 942 (2nd Cir. 1980), the 2nd Circuit Court of Appeals found estoppel against the government in a situation identical to Schweiker, supra, and the Supreme Court refused to reverse. Moser V. United States, 341 U.S. 41, 82 S.Ct. 553, 95 L.Ed. 729 (1951), also cited by Johnson v. Williford, supra, involved a limited form of estoppel against the United States in an immigration case, although the Court stated there was actually no need to apply estoppel.

In Northern Life Ins. v. United States, 685 F.2d 277 at 279 (9th Cir. 1982), it was held that estoppel may lie against the government if the Petitioner relies on an act to his detriment under circumstances where he could reasonably rely on that act. There is no reason why Appellants in these cases should not have seen it reasonable to rely on the 1969 Restoration Order which specifically stated Petitioners' patented lands would not be affected! The government should be estopped from asserting loss of access as the applicable taking or the date that Petitioners' cause of action arose.

It is affirmative misconduct to now hold that the loss of access was the event of taking of Petitioners' land when the 1969 Order itself stated that the restoration did not affect patented lands. The passage of Public Law 93-350 also appears to be a recognition of

Petitioners' valid interests rather than a denial of those interests.[7]

Nor does the analysis of misconduct stop in 1969. The whole problem of Petitioners' land and improvements is directly related to the wrongful issuance of patents on land which the Government was obligated to open up only under the mineral laws. Not only did the Government issue patents, considered the highest form of title, it allowed the State to select certain lands in the strip. Finally, the Government opened up some 200,000 acres to ranching, which was also expressly forbidden by the Treaty.

Were the Government a private party, its error could have been discovered by an abstract or title policy. Most searches end or begin from a patent issued by the United States. The holding by the Court of Appeals that the loss of access from the cancellation of leases in 1973 is patently inequitable. A party who represents one thing and does another is guilty of affirmative misconduct. If indeed the loss of access is the final event in the taking, the Government should be barred under the principle of equitable estoppel from so asserting.

This Court has held that neither the government nor

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[7] Petitioners are not conceding that they have no access. Both 43 U.S.C. §1063 and 43 U.S.C. §932 provide permissive access across federal lands. 43 U.S.C. §315(e) specifically states that access across Taylor Grazing land is encouraged for all proper and lawful uses. Furthermore, the Bureau of Indian Affairs representative who testified at trial stated that all roads within the Reservation are open to the public.

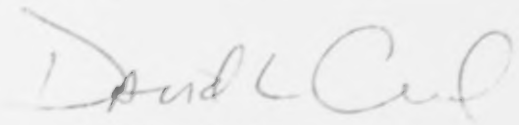
a landowner can profit from appreciation or diminution in value caused by the government's acts in condemning. United States v. Cors, 337 U.S. 325, 69 S.Ct. 1086, 93 L.Ed 1392 (1949). See also U.S. v. Rands, 389 U.S. 121, 88 S.Ct. 265, 19 L.Ed.2d 329 (1967); United States v. Twin City Power Co., 350 U.S. 222, 765 S.Ct. 259, 100 L.Ed. 240 (1956), reh denied 350 U.S. 1009, 76 S.Ct. 648, 100 L.Ed. 871 (1956). It would seem that a government which cannot profit by a diminution in value by its acts ought not profit by affirmatively disclaming interest in Petitioners' lands (1969) while claiming that Petitioners lost their access by virtue of that same 1969 Order or the subsequent 1973 cancellation of leases.

A sovereign owes a greater duty to its citizens and should be held to a higher standard.

CONCLUSION

Based upon the foregoing. we submit that this Petition for Writ of Certiorari to the Court should be granted.

Respectfully submitted.



David L. Curl for
BARASSI & CURL. P.C.
485 South Main Avenue
Tucson. Arizona 85701
Telephone (602)884-7777
Attorneys for Petitioners

CERTIFICATE OF SERVICE FOR PETITION FOR WRIT OF CERTIORARI

I, DAVID L. CURL, do hereby certify, under penalty of perjury, that two originals of the Petition for Writ of Certiorari were mailed on the 23 day of May, 1986, to:

Ms. Laura E. Frossard
Appellate Section
Land & Natural Resources Division
Department of Justice
Washington, D. C. 20530

David L. Curl for
BARASSI & CURL, P.C.
485 South Main Avenue
Tucson, Arizona 85701
Telephone: (602) 884-7777
Attorneys for Petitioners

APPENDIX

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APPENDIX "A"

Opinion
Dated February 28, 1986

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 85-2317

RODNEY ALDER, RITA ALDER,
MARDEN ALDER, SHARON ALDER,
ESTATE OF ELBERT ALDER, AND
BEAULAH ALDER,

Appellants,

V.

THE UNITED STATES,

Appellee.

David L. Curl, Barassi & Curl, P. C., of Tucson, Arizona, argued for Appellants.

Laura Frossard, Department of Justice, of Washington, D.C., argued for Appellee. With her on the brief were F. Henry Habicht, II, Assistant Attorney General and David C. Shilton.

Appealed from: U. S. Claims Court
Judge White

DECIDED: February 28, 1986

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Before DAVIS, Circuit Judge,
MILLER, Senior Circuit Judge, and
NEWMAN, Circuit Judge.

NEWMAN, Circuit Judge.

Appellants Rodney Alder, Rita Alder, Marden Alder, Sharon Alder, Estate of Elbert Alder, and Beaulah Alder (the Alders) appeal from the decision of the United States Claims Court dismissing their claim in inverse condemnation against the United States. This appeal was consolidated for argument with that of Bundrick v. United States, No. 85-2316, also decided this day.

The detailed background of this case is set forth in the findings and opinion of the Claims Court, 7 Cl. Ct. 542 (1985), and will not be repeated. There are two interrelated subjected of this appeal: those relating to compensation under the San Carlos Mineral Strip-Purchase,

Pub. L. No. 93-530, 88 Stat. 1711 (1974), and those relating to a Fifth Amendment taking claim.

A. Public Law 93-530

Reference is made to the opinion of the Claims Court for the history of this statute, enacted December 22, 1974, which provided certain relief to property owners within the San Carlos Mineral Strip. The pertinent provisions of Public Law 93-530 are:

> "Sec. 1. The Secretary of the Interior (hereinafter referred to as the "Secretary") is hereby authorized and directed to acquire through purchase within the so-called San Carlos Mineral Strip as of January 24, 1969, all privately owned real property, taking title thereto in the name of the United States in trust for the San Carlos Apache Indian Tribe.
>
> Sec. 2. The Secretary is authorized and directed to purchase from the owners all range improvements of a permanent nature placed, under the authority of a permit from or agreement with the United States, on the lands restored to the San Carlos Apache Indian Tribe for the reasonable value of such improvements, as determined by the Secretary . . . ."

Although appellants have intertwined the issues arising from Public Law 93-530 and those based on the Fifth Amendment, the Claims Court properly treated them separately. Thus, although appellants' objection to the

valuation of their property by the Secretary of the Interior was couched in part in Fifth Amendment taking terms, the Claims Court considered separately its judicial review of the administration of Public Law 93-530. The statute is silent on this point and the Claims Court stated that it assumed, without deciding, that it had jurisdiction to review the correctness of the valuation of the Alders' property.

In general, absent statutory provision to the contrary, judicial review of administrative action is favored. See Friedman v. United States, 310 F.2d 381, 159 Ct. Cl. 1 (1963), cert. denied sub nom. Lap v. United States, 373 U.S. 932 (1963), and cases cited therein; see also Sierra Club v. Peterson, 705 F.2d 1475, 1478-79 (9th Cir. 1983). In Snowbank Enterprises, Inc. v. United States, 6 Cl. Ct. 476 (1984), the Claims Court reviewed an administrative valuation of property in implementation of a similar remedial statute.

Appellants challenge the provision in Public Law 93-530 that set January 24, 1969 as the date of valuation of their real property. Appellants also challenge the Secretary of the Interior's use of the same 1969 date for valuation under Section 2 of the permanent range improvements on the leased grazing land.

The Claims Court held that the Alders had not met their burden of proving, by a preponderance of the evidence, that their holdings had been improperly valued. The court observed that the Alders had offered no evidence that the fair market value of either their fee land or the improvements on the leased land had a higher

market value after January 24, 1969, the date that the United States transferred ownership of the federal leased land to the San Carlos Apache Indian Tribe. Appellants state in their brief "[i]f the Secretary had used 1977 as the date of valuation, there would have been no problem at all". Appellants do not explain how this would benefit them, since they insist that their land became worthless in 1973.

The Alders do not deny that they submitted no alternative appraisals, but rather assert that the trial before the Claims Court was "for liability only". Whether or not this statement is correct insofar as Fifth Amendment liability is concerned, liability under Public Law 93-530 was not at issue before the Claims Court, and has not been denied by the government.

The Alders also argue that they are entitled to compensation for the value of certain contiguous land (204.12 acres) outside the San Carlos Mineral Strip, which they state is now "useles". Public Law 93-530 refers only to land within the San Carlos Mineral Strip. Since the purpose of Public Law 93-350 was to reacquire lands that at one time were part of the San Carlos Apache reservation, there is no obligation on the United States under this statute to acquire land in addition to that acquired for the benefit of the San Carlos Apache Tribe. We discern no basis for overturning the Claims Court's decision that the statute was properly administered.

We affirm the Claims Court's holding that the valuation conditions set in P.L. 93-530 are not unreasonable, and that the Secretary reasonably executed the statute in

valuing the improvements on the leased grazing land, as well as the fee land, as of January 1969. See Chevron USA, Inc. v. Natural Resources Defense Council, 104 S. Ct. 2778, 2782-83, reh'g denied, 105 S. Ct. 28 (1984).

Appellants also raise the question of payment of interest, asserting that fairness requires, if their property is valued as of 1969, that interest be paid on that amount. The government argues that because Public Law 93-530 does not expressly provide for the payment of interest the government is not liable therefor, citing United States v. Thayer-West Point Hotel Co., 329 U.S. 585, 588-90 (1947), and Snowbank Enterprises, Inc. v. United States, 6 Cl. Ct. at 495. These cases acknowledge the obligation of the United States to pay interest on Fifth Amendment takings, but as stated in Thayer-West Point, 329 U.S. at 589-90:

> [I]n the absence of constitutional connotations, "just compensation" is not a term of art so far as interest is concerned. The inclusion or exclusion of interest depends upon other contractual provisions, the intention of the parties and the circumstances surrounding the use of the term.

See also Jacobs v. United States, 290 U.S. 13, 16 (1933); Tillson v. United States, 100 U.S. 43, 47 (1879). Public Law 93-530 is silent as to the payment of interest. As in Thayer-West Point, 329 U.S. at 590, "the intention of Congress to permit the recovery of interest must be expressly and specifically set forth in the statute."

Principles of statutory construction require the assumption that Congress was aware, when Public Law 93-530 provided that the property would be valued as of a date five years earlier than the date of enactment, that omitting express provision for the payment of interest would negate the recovery of interest.

B. The Fifth Amendment

Without deciding whether the Alders could have made any claim under the Fifth Amendment for the taking of improvements on land they originally leased under the Taylor Grazing Act, 43 U.S.C. §§ 315-315g, 315h-315m, 315n and 315o-l, and after January 1969 leased from the San Carlos Apache Tribe[1], the Claims Court held that any such claim accrued no later than July 1, 1973, the expiration of the final lease from the San Carlos Tribe, and thus was time barred under 28 U.S.C. §2501 when the Alders filed their complaint in the United States District Court for the District of Arizona on September 17, 1982. 28 U.S.C. § 2501 provides that:

> Every claim of which the United States Claims Court has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

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[1] 43 U.S.C. § 315(b) provides that "the issuance of a permit pursuant to the provisions of this chapter shall not create any right, title, interest, or estate in or to the lands." However, § 315(c) provides that a successor permittee under the Act shall "[pay] to such prior occupant the reasonable value of such improvements."

With respect to the Alders' fee land within the San Carlos Mineral Strip, the Claims Court reasoned first that the taking occurred in January 1969, on the basis that the Alders' access to their fee land was possible thereafter only by sufferance of the Indian authorities. The fee land continued to be used as the Alders' ranching base until July 1973, when ranching became no longer possible because of loss of the Alders' leasehold for the grazing land owned by the San Carlos Apache Tribe. Thus, the Claims Court held in the alternative, the taking of the fee land accrued no later than July 1973. The Claims Court held that this claim was also time barred under 28 U.S.C. § 2501.

Appellants argue that these holdings are incorrect, asserting that there was no time certain at which taking could reasonably have accrued prior to the valuation of their property in 1977, when it first appeared to the Alders that they might not receive adequate compensation under Public Law 93-530. They argue that their property rights were continuously affected until 1977-79 when their last neighbors left and their use of and access through certain state lands within the San Carlos Mineral Strip were lost upon settlement of litigation between the State of Arizona and the United States in 1978. The Alders argue that their fee lands have still not been "taken" in that they till own them and pay taxes on them. (On this basis, the government refuses to concede that the Alders ever had a Fifth Amendment claim - even as the government argues that it is time barred).

Appellants rely on United States v. Dickinson, 331

U.S. 745, 748 (1947), wherein the Court stated that it is improper to

> [put] on the owner the onus of determining the decisive moment in the process of acquisition by the United States when the fact of taking could no longer be in controversy.

The departure of the last of the Alders' neighbors in 1977-79 and the loss by the state in 1978 of rights that may have benefited the Alders, are not the quality of continuing events that Dickinson contemplated in its holding that the cause does not accrue "until the situation becomes stabilized". Id. at 749. In Dickinson, the water above the dam was continuing to rise. For the Alders, in July of 1973, they lost all grazing permits from the San Carlos Tribe, and were obliged to discontinue all ranching operations; they had no right to use the access road across tribal lands; and they conceded that their fee land had no market or mortgage value. The situation had become stabilized. Although the Alders continued to own the fee lands, they described them as "landlocked" and "useless". The Alders do not argue that they were unaware that a taking had occurred, or that there was anything left to take. Under Dickinson and related authority, the cause of action for inverse condemnation had accrued by July, 1973. See Barnes v. United States, 538 F.2d 865, 873, 210 Ct. Cl. 467, 480 (1976)("[T]he date of taking here is . . . after it first became clearly apparent . . . that the intermittent flooding was of a permanent nature."); Pete v. United States, 531 F.2d 1018, 1031, 209 Ct. Cl. 270, 292-93

(1976) (''Property is legally taken when the taking directly interferes with or substantially disturbs the owner's use and enjoyment of the property.'').

In support of their argument that the cause did not accrue because they did not know until 1978 or 1979 that their remedy under Public Law 93-530 would be inadequate, appellants cite Friedman v. United States, 310 F.2d at 385, 159 Ct. Cl. at 8, for the proposition that where Congress has ''deliberately given an administrative body the function of deciding all or part of the claimant's entitlement'', the claim does not ''ripen'' until the official has acted or refused to act. However, the government has not asserted that the Alders' claim under Public Law 93-530 is time barred. It is only the Fifth Amendment claim that was not timely brought; and Congress made no such delegation to an administrative body with respect to the Fifth Amendment claim. The Friedman court said at 310 F.2d at 388, 159 Ct. Cl. at 11-12 [Footnote omitted]:

> Where, however, an administrative remedy is permissive (i.e., suit may be brought without exhausting the remedy), the court has usually held that the running of limitations is not deferred or tolled by such optional administrative consideration.

The enactment of Public Law 93-530 provided the Alders with an alternative, administrative remedy. The time consumed in administering this law does not toll the statute of limitations governing actions under the Fifth Amendment.

Appellants argue that until enactment of Public Law 93-530 they had no remedy whatsoever, because neither the United States nor the San Carlos Apache Indian Tribe had waived its sovereign immunity. Thus, they argue, the statute of limitations could not have started to run in 1969 or in 1973. Since their claim under Public Law 93-530 is not time barred, they ask us to conclude that their Fifth Amendment claim is also not time barred.

Appellants err in their premise that each taking claim under the Fifth Amendment requires a specific waiver of sovereign immunity. The Constitution had already achieved that popular right. See, e.g., United States v. Testan, 424 U.S. 392, 401 (1976)("These [just compensation] Fifth Amendment cases are tied to the language, purpose, and self-executing aspects of that constitutional provision ...."); Jacobs v. United States, 290 U.S. at 16 ("The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary.") The right remains subject, however, to the time limitation of 28 U.S.C. § 2501.

We have carefully considered all of appellants' arguments, and conclude that the Claims Court correctly held that the Fifth Amendment taking claim is time barred.

AFFIRMED

APPENDIX "B"

Opinion
Filed March 22, 1985

IN THE UNITED STATES CLAIMS COURT

No. 37-83L

RODNEY ALDER, RITA ALDER, MARDEN ALDER, SHARON ALDER, ESTATE OF ELBERT ALDER, AND BEAULAH ALDER,

Plaintiffs,

V.

THE UNITED STATES,

Defendant.

David L. Curl, Tucson, Arizona, for Plaintiffs. Louis W. Barassi, of counsel.

Laura Frossard, with whom was Assistant Attorney General F. Henry Habicht II, Washington, D.C., for Defendant.

OPINION

WHITE, Senior Judge.

This is a companion case to Bundrick v. United States, No. 622-82L, decided March 18, 1985. The facts and the legal issues in this case are quite similar to those involved in the Bundrick case.

The background information set out in the Bundrick opinion under the headings, "The San Carlos Mineral Strip" and "Remedial Legislation," is equally applicable to the present case, and it will not be repeated in this opinion.***

The plaintiffs in this case complain that the United States has deprived them of the use and benefit of certain land which they own in fee and of improvements which they placed on other lands which they formerly used under permits issued by the Bureau of Land Management, Department of the Interior.

*** Note: A Petition for A Writ of Certiorari to the United States Court of Appeals for the Federal Circuit has been filed in Bundrick v. United States In The Supreme Court of the United States for the October Term, 1986, bearing No. 85-1815.

The Facts

The fee land is a 400.25-acre parcel that is situated in section 27, T. 5 S., R. 21 E., Gila and Salt River Base and Meridian, Graham County, Arizona. The parcel is generally rectangular in shape and it occupies somewhat more than the W 1/2 of section 27 (except the SW 1/4 SW 1/4, which is owned in fee by someone else). The southern boundary of the San Carlos Mineral Strip bisects the Alders' fee land from east to west, with 196.13 acres of the fee land lying north of the boundary line and inside the fee land lying north of the boundary line and inside the Mineral Strip, and 204.12 acres of the fee land lying south of the boundary line and outside the Mineral Strip.

The Alder family acquired the fee land in about 1960. From that time until approximately 1973, they maintained on the portion of the fee land within the Mineral Strip a nice brick residence, with two bedrooms, a bathroom, a fireplace, and furniture; a water well; and a light plant. Butane gas was used as a source of power. None of the Alders ever lived in the house, although members of the family occasionally spent weekends there. The house was usually occupied by an employee (and, presumably, the employee's family).

In addition to the house, the Alders maintained two bunkhouses and other elements of a ranch headquarters on the portion of the fee land located within the Mineral Strip.

The validity of the plaintiffs' title to the fee land is not questioned by the defendant in the present litigation.

The Alders operated a cattle ranch in federal Range Unit 26 from about 1960 until 1973. The ranch consisted of the fee land previously mentioned and of land which they used until 1969 under permit from the Bureau of Land Management. Part of the federal land was inside and part was outside the exterior boundary of the San Carlos Mineral Strip. The federal land inside the Mineral Strip consisted of all or part of 13 sections of land. The ranch house and other elements of the ranch headquarters were located on the portion of the fee land lying inside the Mineral Strip.

In addition to the permanent improvements which the Alders placed on the fee land inside the Mineral Strip, as previously mentioned, they also placed permanent improvements on the federal land inside the Mineral Strip which they used under permit.

The only feasible means of reaching the Alders' fee land in section 27 is over a graded road, known as the Goodwin Wash Road, running in a southwesterly direction from outside the San Carlos Mineral Strip, and then passing over approximately 8.5 miles of land within the Mineral Strip before reaching the Alders' fee land in section 27. Until January 1969, the 8.5-mile portion of the road within the Mineral Strip first crossed about a mile of federal land and then crossed state land and patented land belonging to other persons before reaching

the Alders' fee land[1].

In addition to operating a ranch in Range Unit 26, the Alders also conducted a cattle ranching operation in federal Range Unit 30 from about 1960 until 1973. This ranching operation did not include any fee land owned by the Alders. It was established on federal land which the Alders used under a permit from the Bureau of Land Management. Part of the federal land was inside and part was outside the exterior boundary of the San Carlos Mineral Strip. The portion inside the Mineral Strip included all or part of six sections of land. The ranch headquarters, a pond, and other permanent improvements were maintained by the Alders on the federal land lying inside the Mineral Strip.

After the effective date of the restoration order of January 1, 1969 (34 Fed. Reg. 1195), restoring the federal land within the San Carlos Mineral Strip to the San Carlos Apache Indian Tribe and making such land part of the San Carlos Indian Reservation, the Alders no longer had permits from the Bureau of Land Management for the use of the former federal land within Range Unit 26 and Range Unit 30 that had become Indian land. In 1970, 1971, and 1972, however, the Alders obtained from the Indian Tribe 1-year permits that permitted them to

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[1] It is possible to reach the Alders' fee land in section 27 over an alternate road, but the road is very rough, it can be traversed only by four-wheel-drive motor vehicles, and it cannot be used to transport cattle to or from the Alders' fee land.

continue their ranching operations in Range Unit 26 and Range Unit 30.

In the early part of 1973, however, the Alders and all other non-Indian ranchers using Indian land within the San Carlos Mineral Strip were notified that no further permits would be issued to non-Indians after the expiration of the then-current permits at the close of June 30, 1983, and that the non-Indian ranchers must remove their cattle from the Indian land before the June 30 expiration data.

Because the fee land which they owned in section 27 and the federal land which they still held under permit in Range Units 26 and 30 did not provide adequate resources for continued ranching operations, the Alders discontinued their ranching operations in the two range units after the expiration of their final permit from the Indian tribe on June 30, 1973.

After the former federal land within the San Carlos Mineral Strip became Indian land, the Indian tribe began constructing a fence along the exterior boundary of the Mineral Strip. The fence along the southern boundary of the Mineral Strip was not built across the Alders' fee land in section 27; but the fence was built in such a way as to segregate the fee land from the Indian land.

Also, subsequent to January 1969, the Goodwin Wash Road crossed about a mile of Indian land after it reached the Mineral Strip boundary on the way to the Alders' fee land in section 27. The Alders, and all other persons crossing Indian land in order to reach patented lands, were notified by the Indian tribe that they should obtain

permits authorizing them to cross Indian land. The Alders have never applied for or obtained permits from the Indian tribe; and they have continued to use the Goodwin Wash Road in traveling to and from their fee land in section 27. They have been stopped and questioned by Indian police on several occasions while traveling over the portion of the road that crosses Indian land, but they have never been prevented from using the road without a permit.

Since land adjacent to the Alders' fee land in section 27 became Indian land in January 1969, there have been incidents of vandalism on the portion of the fee land lying inside the boundary of the San Carlos Mineral Strip and inside the Indian reservation. The ranch house has been virtually destroyed. The windows have been destroyed, the doors have been taken away, the electric wiring has been torn out, and an unsuccessful effort was made to tear out the firebox in the fireplace. A complaint was made by the Alders to the Sheriff of Graham County, but his response was that the county did not have any jurisdiction over criminal offenses committed within the San Carlos Indian Reservation.

Also, after the federal land which the Alders formerly used in Range Unit 30 became Indian land, there has been vandalism on improvements which the Alders maintained on such land.

The vandalism mentioned in the two immediately preceding paragraphs was committed by persons unknown. There is nothing in the record to indicate that personnel of the United States was involved. The evidence in the

record does show, however, that personnel of the Bureau of Indian Affairs, after the land used by the Alders in Range Unit 30 became Indian land, drained the pond which the Alders had maintained on such land.

Following the enactment in December 1974 of Public Law 93-530 (88 Stat. 1711), authorizing and directing the Secretary of the Interior to purchase all patented lands within the San Carlos Mineral Strip and to reimburse ranchers within the Mineral Strip for the improvements which they had maintained on former federal land under permit, the Interior Department engaged independent professional appraisers to appraise the value of all such patented lands and related improvements. On the basis of the appraisals, the Interior Department then made offers to the ranchers within the Mineral Strip, including the plaintiffs.

The appraisal of the plaintiffs' fee land and improvements within the San Carlos Mineral Strip was completed in late 1977. The Interior Department offered the plaintiffs $24,455 for their improvements on former federal land in Range Unit 30 that had become Indian land, and $116,174.98 for their improvements on former federal land in Range Unit 26 that had become Indian land and for the purchase of the portion of their fee land in section 27 lying within the San Carlos Mineral Strip.

These offers were rejected by the plaintiffs, who were dissatisfied with the selection of January 24, 1969, as the date for the valuation of the improvements and the fee land. The Alders contended that the improvements in Range Unit 30 should be valued at $63,000, and that the

improvements and the fee land in Range Unit 26 should be valued at $195,000. They made a counterproposal along those lines, but the Interior Department did not accept the counterproposal.

On September 17, 1982, the plaintiffs filed a complaint in the United States District Court for the District of Arizona. The complaint named as defendants the United States, the Department of the Interior, the Secretary of the Interior, an official of the Bureau of Indian Affairs, and the San Carlos Indian Tribe.

In an order dated December 22, 1982, the District Court transferred to this court (as successor to the United States Court of Claims) the complaint against the United States, and dismissed without prejudice the complaint insofar as it named other defendants.

Discussion

In the complaint against the United States, the plaintiffs combine (1) allegations regarding improper administration by the Interior Department of the remedial provisions of Public Law 93-530, with (2) assertions to the effect that actions by the Federal Government have effectively deprived them of the use of their property and, accordingly, their property has been taken for the benefit of the United States without just compensation.

Claim Under Public Law 93-530

With respect to the plaintiffs' contention that the Interior Department improperly administered, as to them, the provisions of Public Law 93-530, it will be assumed

for the purpose of discussion -- but without deciding -- that the plaintiffs could assert a cause of action under Public Law 93-530 if the Secretary of the Interior (or his representatives) failed to value properly the plaintiffs' fee land and improvements within the San Carlos Mineral Strip.

It appears that the plaintiffs' claim under Public Law 93-530 did not arise any earlier than late December 1977. It was then, according to the evidence in the record, that the Interior Department first announced its decision regarding the amounts that would be paid to the plaintiffs for their fee land and improvements upon the basis of the appraisal reports previously prepared by a firm of professional appraisers. Until that time, the Interior Department had not taken any action under the statute which adversely affected the plaintiffs, and thus had not previously fixed the liability (if any) of the Federal Government. Consequently, the 6-year period of limitations for the filing of an action against the Government (28 U.S.C. § 2501 (1976)) had not begun to run. Cf. Japanese War Notes Claimants Association of the Philippines, Inc. v. United States, 178 Ct. Cl. 630, 632-33, 373 F.2d 356, 358, cert. denied, 389 U.S. 971 (1967), rehearing denied, 390 U.S. 975 (1968); Fattore v. United States, 160 Ct. Cl. 666, 670, 312 F.2d 797, 800 (1963).

Accordingly, when the plaintiffs filed their complaint in the District Court on September 17, 1982, they acted within the prescribed 6-year period of limitations following the accrual of the claim in late December 1977.

The plaintiffs had the burden, however, of presenting at the trial facts sufficient to prove by a preponderance of the evidence that personnel of the Interior Department failed to value properly their fee land and improvements within the San Carlos Mineral Strip, Loeosch v. United States, 227 Ct. Cl. 34, 44, 645 F.2d 905, 914 (1981); Bonnar v. United States, 194 Ct. Cl. 103, 145, 438 F. 2d 540, 562 (1971); Morris v. United States, 171 Ct. Cl. 220, 228 (1965). The plaintiffs did not meet this burden.

The principal allegation in the complaint concerning the administration of Public Law 93-530 is that January 24, 1969, was arbitrarily set as the date for the valuation of the plaintiffs' fee land and improvements within the San Carlos Mineral Strip, and that the selection of this date effectively denied the plaintiffs proper compensation for their property. This objection is not well taken.

Section 1 of the pertinent statute authorized and directed the Secretary of the Interior "to acquire through purchase within the so-called San Carlos Mineral Strip as of January 24, 1969, all privately owned real property, taking title thereto in the name of the United States in trust for the San Carlos Apache Indian Tribe" (emphasis supplied). It was not arbitrary for the Interior Department to take the position that Congress had fixed the precise date as of which patented lands within the Mineral Strip should be acquired from landowners willing to sell.

It is true that section 2 of Public Law 93-530,

authorizing and directing the Secretary of the Interior to reimburse landowners within the San Carlos Mineral Strip for the permanent improvements placed by them on lands previously held under leases or permits from the Federal Government, did not specify the date as of which the value of the improvements should be determined. The section did state, however, that reimbursement should be "for the reasonable value of such improvements as determined by the Secretary" (emphasis supplied). The evidence in the record would not support a finding that the Interior Department was guilty of an abuse of the discretion vested in the Secretary when personnel of the Department decided that the permanent range improvements on former federal land should be valued as of the same date determined by the Congress for the acquisition of patented lands within the Mineral Strip.

Moreover, the plaintiffs did not offer any evidence at the trial tending to prove that, if some date other than January 24, 1969, had been selected as the date of valuation, the fair market value of their patented land and the improvements which they placed on former federal land within the San Carlos Mineral Strip would have been greater than the total figure of $140,629.98, which the Interior Department offered to pay the plaintiffs under the provisions of Public Law 93-530.

Another allegation in the complaint with respect to the administration of Public Law 93-530 by the Interior Department is to the effect that the Department has paid unequal prices to claimants, and has thereby violated the Equal Protection Clause of the Constitution. The plain-

tiffs did not offer any evidence at the trial in support of this allegation.

By way of summary, the plaintiffs failed to prove at the trial that the Interior Department, in administering the remedial provisions of Public Law 93-530 as to the plaintiffs, violated any rights which the plaintiffs may have had under the statute. (It is assumed that $140,629.98 is still available to the plaintiffs under the statute.)

Claim Under Fifth Amendment

Insofar as the plaintiffs are suing for just compensation under the Fifth Amendment to the Constitution, it apparently is the plaintiffs' theory of liability with respect to the improvements which they placed on former federal land within the San Carlos Mineral Strip that "[w]hen Plaintiffs lost the right of use to the [federal] leased land, they lost the right to use of their improvements." The plaintiffs' right to use the former federal land which they held under permit was lost later than July 1, 1973, when the San Carlos Apache Indian Tribe refused to permit the plaintiffs (and other non-Indian ranchers within the Mineral Strip) to use Indian land any more for ranching operations. Accordingly, any legal claim which the plaintiffs may have had against the United States for the value of the improvements on former federal land accrued not later than July 1, 1973.

The plaintiffs were required by 28 U.S.C. § 2501 (1970) to institute an action against the United States under the Fifth Amendment for the alleged taking of the

improvements within 6 years after the claim first accrued. The plaintiffs failed to meet this mandatory deadline when they filed their original complaint in the District Court on September 17, 1982.

With respect to the plaintiffs' claim for just compensation under the Fifth Amendment for the alleged taking of their patented land in section 27, the plaintiffs argue that their land was effectively taken through the action of the Federal Government in restoring to tribal ownership the former federal land in the San Carlos Mineral Strip. As a result of that action, according to the plaintiffs, they have been deprived of an enforceable legal right of ingress and egress to and from their patented land over the Goodwin Wash Road, which they formerly had; there is no longer any market for the patented land, and it has no value as collateral for a loan; and the patented land can no longer be used as part of a viable ranching operation, without the use of the former federal land within the San Carlos Mineral Strip which the plaintiffs were permitted to use in conjunction with their patented land.

The action of the United States in restoring the former land within the San Carlos Mineral Strip to tribal ownership was completed upon the promulgation of the restoration order in January 1969. Thereafter, the Goodwin Wash Road traversed some Indian land on its way to the plaintiffs' fee land; and use of the road by the plaintiffs depended upon the permission (tacit or express) of the Indian authorities.

The plaintiffs were permitted by the Indian tribe to

continue to use for ranching purposes, until June 30, 1973, the same land within the Mineral Strip that they formerly used under federal permit. Thus, the plaintiffs continued to have a viable ranching operation until June 30, 1973, with their patented land in section 27 as a base. Beginning on July 1, 1973, however, and continuing thereafter, the loss of the use of the former federal land in the San Carlos Mineral Strip rendered the plaintiffs' patented land useless as part of a ranching operation, according to the evidence in the record. Therefore, any claim which the plaintiffs may have had against the United States for the alleged taking of their patented land accrued no later than July 1, 1973.

Consequently, the plaintiffs had a 6-year period beginning July 1, 1973, at the latest, within which to institute an action on their taking claim under the Fifth Amendment with respect to the fee land. The plaintiffs' original complaint was filed at least 9 years after the claim first accrued, and it was too late.

CONCLUSION OF LAW

For the reasons stated in the opinion, the court concludes as a matter of law that the plaintiffs are not entitled to recover.

The complaint will therefore be dismissed by the clerk.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
JUN 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2) (7)

Nos. 85-1815 and 85-1938

In the Supreme Court of the United States

OCTOBER TERM, 1985

EDWARD BUNDRICK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

RODNEY ALDER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

DAVID C. SHILTON
LAURA E. FROSSARD
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

17 pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioners' cause of action for inverse condemnation of their fee land had accrued more than six years before petitioners filed suit.

2. Whether, on the facts of this case, the United States may be equitably estopped from contending that the Secretary's 1969 order restoring certain land to tribal ownership resulted in the accrual of petitioners' cause of action for inverse condemnation.

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OPINIONS BELOW

The opinion of the court of appeals in *Bundrick* v. *United States* (85-1815 Pet. App. 1-10) is reported at 785 F.2d 1009. The opinion of the court of appeals in *Alder* v. *United States* (85-1938 Pet. App. 1-11) is reported at 785 F.2d 1004. The opinion of the Claims Court in *Bundrick* (85-1815 Pet. App. 11-33) is reported at 7 Cl. Ct. 532. The opinion of the Claims

Court in *Alder* (85-1938 Pet. App. 13-26) is reported at 7 Cl. Ct. 542.

JURISDICTION

The judgments of the court of appeals were entered on February 28, 1986. The petition for a writ of certiorari in No. 85-1815 was filed on April 30, 1986. The petition for a writ of certiorari in No. 85-1938 was filed on May 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. These cases, which were consolidated for trial and for argument in the court of appeals, are actions for inverse condemnation. Petitioners operated ranches on land that falls into three categories: (1) land owned in fee, (2) land leased from the Bureau of Land Management (BLM) and (3) land leased from the State of Arizona.[1] Title to all three categories of land is traceable to homestead patents erroneously issued by the United States between 1896 and 1934 for what was a portion of the San Carlos Indian Reservation (85-1815 Pet. App. 14-16; 85-1938 Pet. App. 14).[2] The United States has not

[1] The Bundricks, petitioners in No. 85-1815, own 1,913.99 acres in Pinal County, Arizona. In addition they leased 12,800 acres from the BLM and additional acreage from the State of Arizona. The Alders, petitioners in No. 85-1938, own 400.25 acres in Graham County, Arizona, of which 196.13 acres are located in the San Carlos Mineral Strip (see note 2, *infra*). They also leased lands from the BLM. The record does not indicate that the Alders leased land from the State of Arizona.

[2] In 1896, the San Carlos Apache Tribe ceded to the United States a 232,000-acre portion of the Reservation, known as the San Carlos Mineral Strip, to be "open to occupation, location, and purchase under the provisions of the mineral-land

sought to cancel the erroneously issued patents, and does not question petitioners' title to the land they own in fee (85-1815 Pet. App. 14; 85-1938 Pet. App. 15).

On March 30, 1931, the Assistant Secretary of the Interior withdrew from disposal the undisposed portion of the San Carlos Mineral Strip. That portion of the Mineral Strip was later leased by the BLM to ranchers, including petitioners, under the Taylor Grazing Act, 43 U.S.C. 315 *et seq.* Petitioners obtained grazing leases covering land in the Mineral Strip in 1953 (85-1815 Pet. App. 17) and in 1960 (85-1938 Pet. App. 14-16). The placing of the undisposed portion of the Mineral Strip under range management in accordance with the Taylor Grazing Act was only temporary until the Secretary of the Interior determined whether to restore these lands to the Tribe as provided for by the Indian Reorganization Act, 25 U.S.C. (& Supp. II) 463. See S. Rep. 93-1234, 93d Cong., 2d Sess. 2-3 (1974).

a. *Disposition of Lands Leased from the BLM.* In orders dated June 17, 1963 (relating to subsurface rights), and January 16, 1969 (surface rights), the Secretary of the Interior restored the Mineral Strip to the San Carlos Apache Tribe (Tribe) "subject to any valid existing rights" (85-1815 Pet. App. 17-18). These orders restored to the Tribe the acres that petitioners leased from the BLM, but did not affect petitioners' title to the lands they owned in fee within the Mineral Strip.

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laws only" (Act of June 10, 1896, ch. 398, § 10, 29 Stat. 360). Despite this restriction, the United States erroneously issued homestead patents, and granted school and indemnity lands to the State of Arizona within the Mineral Strip between 1896 and 1934.

As a consequence of the 1969 order, the Bundricks' fee land was completely surrounded by tribal land, and the road leading to the Alders' fee land became tribal land. The Tribe did not prevent petitioners from travelling to and from their land, but did request persons regularly crossing tribal lands to obtain a permit from the Tribe (85-1815 Pet. App. 20-21; 85-1938 Pet. App. 17-18). Petitioners never applied for, or obtained, such permits (85-1815 Pet. App. 21; 85-1938 Pet. App. 18). With respect to lands petitioners leased, the Tribe issued grazing permits to petitioners in 1970, 1971, and 1972. In 1973, however, the Tribe notified petitioners that tribal grazing permits would no longer be issued to non-Indians, and that petitioners would have to remove their cattle when the 1972 permits expired, *i.e.*, June 30, 1973 (85-1815 Pet. App. 21-22; 85-1938 Pet. App. 17).

b. *Disposition of lands leased from the State of Arizona.* The land that the government had erroneously granted to the State of Arizona prior to 1934 (see note 2, *supra*) was the subject of litigation resolved by consent decree. *State of Arizona* v. *Morton*, CIV No. 74-696-PHX-WDC (D. Ariz. Apr. 11, 1978). Pursuant to that decree, on April 11, 1978, the United States acquired title in trust for the Tribe for all such lands within the Mineral Strip (85-1815 Pet. App. 18). The land the Bundrick petitioners previously leased from the State thus became tribal land for which grazing permits could not be obtained.[3] Without these grazing lands, petitioners discontinued their ranching operations (85-1815 Pet. App. 22-23; 85-1938 Pet. App. 17).

c. *Disposition of lands owned in fee.* On December 22, 1974, Congress enacted Pub. L. No. 93-530, 88 Stat.

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[3] The Alder petitioners had not leased land from the State of Arizona (see note 1, *supra*).

1711 *et seq.* (the Remedial Act), directing the Secretary to purchase all privately-owned real property in the Mineral Strip, and all permanent range improvements placed on lands within the Mineral Strip formerly leased from the federal government, which had been restored to tribal ownership. Pursuant to the Remedial Act, the Secretary appraised both petitioners' fee lands and the permanent improvements built by petitioners on the land they formerly leased from the BLM. On March 24, 1978, the Secretary offered to purchase the Bundrick petitioners' fee lands and the improvements on the formerly leased lands for $250,432 (85-1815 Pet. App. 24). On January 19, 1979, after a new appraisal, the Secretary increased the offer to $256,038 (*id.* at 25). On May 12, 1978, the Secretary offered to purchase the Alder petitioners' permanent improvements on a portion of their formerly leased land for $24,455 (85-1938 Pet. App. 19); and on March 30, 1979, offered to purchase the Alders' fee lands and the permanent improvements on the remaining leased land for $116,174.98 (*ibid.*).

2. Petitioners—the only Mineral Strip landowners to do so—rejected these offers and filed suit against the United States and various federal officials in the United States District Court for the District of Arizona, seeking money damages for the taking of their fee land and leased land improvements, quiet title to the real property, and a writ of mandamus to require the defendant federal officials to comply with the Remedial Act.[4] The district court transferred the inverse condemnation claims to the Claims Court and dismissed the other claims with prejudice (Bundrick C.A. App. 61). Petitioners filed complaints in the

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[4] The Bundrick complaint was filed on October 16, 1981; the Alder complaint on September 17, 1982.

Claims Court alleging that the United States had deprived them of the use of their property and had failed to pay just compensation as required by the Remedial Act (Bundrick C.A. App. 62-65; Alder C.A. App. 43-47).

3. After a consolidated trial the Claims Court dismissed petitioners' complaints (85-1815 Pet. App. 33; 85-1938 Pet. App. 26).

a. In *Bundrick*, the court held that petitioners did not have a property interest in the improvements on the lands leased from the BLM, and thus the government's transfer of that land to the Tribe did not create a right to compensation under the Fifth Amendment (85-1815 Pet. App. 26-27). The court further held (*id.* at 28-30) that, even if petitioners had a compensable property interest in the improvements, their claim for such compensation accrued no later than July 1, 1973, and their suit (filed on October 16, 1981) therefore was barred by the six-year limitation period of 28 U.S.C. 2501.[5]

Similarly, the court held that the statute of limitations barred the Bundrick petitioners' claim that the United States "took" their fee land by depriving them of an "enforceable legal right of access" to those lands. The court stated that any claim for inverse condemnation accrued on January 16, 1969, when the Secretary restored the federal land within the Mineral Strip to the Tribe (85-1815 Pet. App. 31-32).[6]

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[5] The court also held that petitioners had no claim against the United States for the loss of the improvements on the land leased from the State, and that any claim petitioners might have against the State for that loss was not before the court (85-1815 Pet. App. 27-28). See 28 U.S.C. 1346(a)(2), 1491(a)(1).

[6] The Claims Court expressly stated that it did not reach the question whether the *Bundrick* complaint had stated a claim for inverse condemnation (85-1815 Pet. App. 31, 32).

The Claims Court dismissed petitioners' claim for compensation for their fee lands under the Remedial Act, relying upon the res judicata effect of the district court's dismissal of petitioners' Remedial Act claims (85-1815 Pet. App. 26).

b. In *Alder*, the Claims Court held that if the Secretary's alleged inaccurate valuation of property to be purchased under the Remedial Act created a claim for relief, that claim arose no earlier than December 1977, and thus was not time-barred (85-1938 Pet. App. 20-21). The court held, however, that petitioners failed to present any evidence that the Secretary improperly valued their land or improvements (*id.* at 22). With regard to petitioners' Fifth Amendment claims for loss of the improvements on the formerly leased land, and for deprivation of their fee land, the court held that all such claims had accrued by July 1, 1973, and were barred by the six-year limitation period (*id.* at 24-26).

4. After consolidating the cases for oral argument, the court of appeals affirmed in separate opinions. In both cases the court rejected petitioners' argument that the statute of limitations had not begun to run on their Fifth Amendment taking claims until 1977 or 1978, when the Secretary's appraisals of their property for Remedial Act compensation were completed (85-1815 Pet. App. 8-9; 85-1938 Pet. App. 7-9). The court of appeals held that by July 1973 the situation had "become stabilized" so that petitioners' causes of action for taking accrued at that time (85-1815 Pet. App. 9; 85-1938 Pet. App. 9). Thus, petitioners' taking claims, brought in 1981 and 1982, were time-barred under the six-year statute of limitations.

With regard to the Remedial Act claims, in *Alder* the court of appeals affirmed the Claims Court's hold-

ing that the Secretary had reasonably valued the property (85-1938 Pet. App. 3-6). In *Bundrick*, however, the court of appeals remanded the Remedial Act issue to the Claims Court for further consideration (85-1815 Pet. App. 5, 7, 10). The court of appeals held that the district court had not intended to dismiss petitioners' Remedial Act claims on the merits, and thus the dismissal was not res judicata (*id.* at 4-5).[7]

ARGUMENT

The decisions of the court of appeals are correct and do not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

Despite the confusing melange of causes of action, theories of recovery and categories of land described in the petitions, these cases boil down to several simple propositions. First, with respect to the disposition of the lands leased from the BLM under the Taylor Grazing Act, petitioners have no right to compensation under the Fifth Amendment. See *United States* v. *Fuller*, 409 U.S. 488, 493-494 (1973).[8] Thus, under whatever rubric petitioners use ("taking," inverse condemnation, continuous encroachment), they have no cause of action relating to the leased property. That leaves petitioners with only a claim that they were entitled to a higher price for their fee land (and improvements on the leased land) under the Remedial Act. Neither the inverse con-

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[7] The United States has not sought further review of this holding.

[8] Of course, as the courts below found, petitioners have no claim against the United States with respect to the grazing lands leased from the State of Arizona.

demnation issue nor the Remedial Act issue warrants this Court's review.

1. Petitioners contend that the court of appeals erred in finding that the Secretary reasonably interpreted the Remedial Act to require valuation of the fee land and improvements as of 1969 (85-1815 Pet. 29-33; 85-1939 Pet. 32-36). There is no occasion to review that question in these cases. In *Bundrick*, the Remedial Act claims are on remand to the Claims Court, so the decision below is interlocutory. And in *Alder* the judgment below rests on the alternative finding that petitioners had presented no evidence to show that the fee land or the improvements had a higher market value after January 24, 1969 (85-1938 Pet. App. 4-5).[9] Moreover, as the court of appeals noted (*id.* at 5), petitioners' argument that the Secretary should have valued the property as of 1977 is contradicted by their allegation that their property became worthless by July 1973. Thus, on the record of this case the 1969 valuation date benefited the Alder petitioners.

2. In the courts below, petitioners bundled their claims together, contending that the passage of the Remedial Act and its subsequent implementation by the Secretary were merely events in a progression of encroachments that culminated in an inverse con-

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[9] The Alder petitioners contend (85-1938 Pet. 35 n.6) that an appraisal of the Bundrick fee land, which was higher than the Secretary's appraisal of that land, showed that the Secretary's appraisal of the Alder fee land was too low. The Bundrick fee land, a much larger ranch located in a different portion of the Mineral Strip, with different improvements and different type of access, is not comparable to the Alder fee land, and no meaningful comparison of appraisals of the two can be made.

demnation. The court of appeals correctly parsed out the components of that theory.

Because of the way the issues were framed in the lower courts, the court of appeals disposed of petitioners' inverse condemnation claims on statute of limitations grounds.[10] Without deciding whether petitioners had stated a claim for inverse condemnation (but assuming that they had (85-1815 Pet. App. 31, 32)), the court of appeals held on the particular facts of these cases that the date on which such claims accured was July 1973. By that time the actions which resulted in the alleged taking had occurred and the extent of the loss was known (*id.* at 8-10; 85-1938 Pet. App. 8-10). When the Secretary restored the federal land within the Mineral Strip to the Tribe in January 1969, petitioners were deprived of their un-

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[10] Had petitioners contended below—as they do in this Court—that their sole remedy is under the Remedial Act (85-1815 Pet. 25-29; 85-1938 Pet. 29-32), this litigation would have been much simplified. Until now, however, petitioners have argued that the passage and implementation of the Remedial Act were merely events in a progression of encroachments that created an inverse condemnation. But the record shows that Congress enacted the Remedial Act to alleviate the hardship suffered by ranchers as a result of efforts to correct the erroneous issuance of rights to the Mineral Strip. The Act authorized the Secretary to acquire petitioners' fee lands without regard to whether the ranchers had a cause of action for that injury. Indeed, if the prior claims petitioners assert had existed, the Remedial Act would have been redundant. Accordingly, any claim that subsequently arose as a result of the Secretary's implementation of the Remedial Act with respect to fee land is, as the court of appeals correctly held, separate from whatever stale claims petitioners assert based on the 1969 restoration order's effect on leased lands.

encumbered right of access to their fee land. The remaining consequences of the January 1969 restoration order were the loss to the petitioners of their grazing leases and the improvements they had placed on the leased lands, which occurred in July 1973, when the Tribe refused to renew petitioners' leases. Thus, as of July 1973 petitioners' fee land was "landlocked," with no right of access across tribal lands, unusable for ranching operations without the adjoining leased grazing lands, not marketable or mortgageable, and the improvements affixed to the leased land could no longer be used (85-1815 Pet. App. 9; 85-1938 Pet. App. 9). There is therefore no merit to petitioners' contention (85-1815 Pet. 19-24; 85-1938 Pet. 23-28) that their alleged inverse condemnation claim had not accrued by July 1973.

Nor is there merit to petitioners' suggestion that the court of appeals misapplied this Court's decision in *United States* v. *Dickinson*, 331 U.S. 745 (1947). The Court held in *Dickinson* that a cause of action accrues when "the situation becomes stabilized" and the consequences of the encroachment "have so manifested themselves that a final account may be struck" (331 U.S. at 749). As the factual findings concurred in by both lower courts show, there was ample basis for concluding that petitioners' inverse condemnation claims were time-barred under *Dickinson*.

3. Petitioners conclude by contending (85-1815 Pet. 40-44; 85-1938 Pet. 43-47) that the government should be estopped from arguing that petitioners' loss of access to their fee land in 1969 resulted in the accrual of the inverse condemnation claim because the Secretary's 1969 restoration order stated that the order "shall not affect any patented lands located within the mineral strip." The court of appeals cor-

rectly declined to hold that the government was equitably estopped (85-1815 Pet. App. 10).

Whether or not the doctrine of equitable estoppel may ever be applied against the government, this Court made clear in *Heckler* v. *Community Health Services*, 467 U.S. 51, 59 (1984), that a party must show at a minimum that the government made a "definite misrepresentation of fact" while "having reason to believe that [the party] will rely upon it * * *." In this case, the Secretary's 1969 order was not a misrepresentation of fact. The order did not restore to tribal ownership any land within the Mineral Strip that was owned in fee by individuals such as petitioners on January 16, 1969.[11] The order restored to the Tribe only the federally-owned land within the Mineral Strip.

Petitioners allege that the order restoring to the Tribe the federal land surrounding their fee land began the process of inverse condemnation of their fee land by cutting off their access to that land. Even if petitioners were correct that the restoration order eventually led to the inverse condemnation of their patented land, that would not be inconsistent with the Secretary's statement that the restoration order did not itself *apply* to patented land. This is especially true since petitioners contend that their fee land was *not* taken in January 1969 (although the process of the taking allegedly began then), but was taken in 1979 when the government made its final offer to pur-

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[11] Petitioners' discussion (85-1815 Pet. 42-43; 85-1938 Pet. 46) of the government's "misconduct" in originally issuing homestead patents within the Mineral Strip is irrelevant to the issues in this case. The government has never sought to cancel the original patents from which petitioners' titles are derived.

chase their property. Petitioners cannot have it both ways; either their fee land was taken by the restoration order and their cause of action for the taking accrued then; or their fee land was not taken by the restoration order, and the statement to that effect in the restoration order was true.

Moreover, the government cannot be equitably estopped by the statement in the restoration order because that order did not cause petitioners to act or forbear to their detriment. See *Heckler* v. *Community Health Services*, 467 U.S. at 59, 61-62; *Schweiker* v. *Hansen*, 450 U.S. 785, 789 (1981). Petitioners were on notice that they no longer had an enforceable right of access in January 1969, when the surrounding federal lands were restored to the Tribe, or certainly when the Tribe notified them that persons regularly crossing tribal land must obtain tribal permits (85-1815 Pet. App. 20-21; 85-1938 Pet. App. 17-18). Thus, even if the Secretary's statement erroneously described the effect of the restoration order on the patented land, the resulting loss of access was apparent, and no statement to the contrary made in 1969 prevented petitioners from bringing suit within six years thereafter. See *Schweiker* v. *Hansen*, 450 U.S. at 789. If petitioners did rely on the 1969 statement in their failure to sue for the loss of the value of their patented land, it was an unreasonable reliance because their loss of access was obvious after 1969. A party seeking to assert equitable estoppel cannot claim to have been misled by relying upon a representation if that party could have acquired knowledge of the truth by reasonable diligence. *Heckler* v. *Community Health Services*, 467 U.S. at 59-60 n.10.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

DAVID C. SHILTON
LAURA E. FROSSARD
Attorneys

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